

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

No. 15,769

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United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 15,769

THE PROCTER & GAMBLE COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

*To the Honorable, the Judges of the United States Court
of Appeals for the Sixth Circuit:*

Petitioner, The Procter & Gamble Company ("Procter"), pursuant to Section 11 (c) of the Clayton Act, as amended (15 U. S. C. § 21 (c), 73 Stat. 243), respectfully requests this Court to review and set aside an Order (and Opinion) of the Federal Trade Commission (the "Commission"), respondent herein, entered on November 26, 1963, and served upon Petitioner on December 16, 1963, in a proceeding entitled "In the Matter of The Procter & Gamble Company, Docket No. 6901."

In support of this Petition, Petitioner respectfully shows:

I.

JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked pursuant to, and venue is based upon, Section 11 (c) of the Clayton Act, 15 U. S. C. § 21 (c), which provides that:

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"(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside."

2. Petitioner is a corporation duly organized and existing under the laws of the State of Ohio, with its principal place of business in the City of Cincinnati, Ohio, and carries on business within this Circuit, to wit, within the State of Ohio.

II.**NATURE AND HISTORY OF THE PROCEEDINGS**

3. On September 30, 1957, the Federal Trade Commission issued its Complaint pursuant to Section 11 of the Clayton Act (U. S. C. Title 15, Section 21), charging that Procter had violated the provisions of Section 7 of the Clayton Act (U. S. C. Title 15, Section 18), as amended and approved December 29, 1950.

4. In substance, the Complaint challenged the legality of the acquisition by Procter (through the medium of a wholly owned subsidiary) on August 1, 1957, of the assets and business of the CLOROX CHEMICAL CO. ("Clorox Chemical") a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 850 - 42nd Avenue, Oakland, California. The business of Clorox Chemical was the manufacture and sale of household liquid bleach under the trade name "Clorox." Procter had never engaged in the business of

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manufacturing or selling household liquid bleach. Nor had it ever been a supplier of any products used in the manufacture of household liquid bleach, or a customer for any products produced in the bleach industry.

5. In its Answer to the Complaint, filed on November 4, 1957, Procter denied all charges of illegality and denied that the said acquisition, or any of the acts or practices complained of, constituted a violation of Section 7 of the Clayton Act, as amended, *supra*.

6. The taking of evidence commenced on December 15, 1957, before a Hearing Examiner of the Commission. The original hearings were concluded on February 12, 1959. The Initial Decision of the Hearing Examiner was filed on June 17, 1960, and by Order of the same date the Examiner directed Procter to divest itself of all assets acquired through the acquisition of Clorox Chemical.

7. Procter appealed to the Commission. The appeal was heard on March 14, 1961. On June 15, 1961, the Commission entered an Order vacating and setting aside the Initial Decision of the Hearing Examiner. Said Order also remanded the proceeding to the Hearing Examiner for the reception of further evidence in conformity with the views expressed in the Opinion of the Commission and directed that the Hearing Examiner thereafter make and file a new Initial Decision. The Commission in thus vacating and setting aside the Initial Decision did not directly pass upon the correctness of most of the Examiner's findings. It held, however, that even on the basis of the findings as made, the record was insufficient to support the Examiner's conclusion that the acquisition would have the probable effect of lessening competition or tending to monopoly. After reviewing various aspects of the evidence, the Commission stated:

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"... we do not agree that [the evidence] supports [the Examiner's] conclusions with respect to the probable effects of the acquisition."

and that:

"The record as presently constituted does not provide an adequate basis for determining the legality of this acquisition. In the circumstances, we might dismiss the complaint. . . ."

8. Such Order of Remand was issued by the Commission *sua sponte*, without the request of any party to the proceeding, without any claim by any party that there were changed conditions of fact or law or that there was any newly discovered evidence, or, indeed, any additional evidence whatsoever essential to the disposition of the proceeding.

9. The Commission's Opinion indicated the scope and purpose of the Remand which it had ordered. It stated that it was remanding the proceeding so as to secure "a more complete and detailed post-acquisition picture, [which] has the advantage of allowing the Commission an informed hindsight upon which it can act rather than placing too strong a reliance upon treacherous conjecture." In line with this, the Commission limited the Remand, stating:

"The case will, therefore, be remanded to the hearing examiner for the reception of evidence relating to the competitive situation as it presently exists in the liquid bleach industry."

and added that:

"This evidence should relate to events occurring subsequent to November 1958, and should include market share data . . . as well as information directed to more clearly delineating the production and merchandising facilities and techniques [of Procter]

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which have been utilized by Clorox under the control of respondent."

10. On November 24, 1961, Procter instituted an action in the United States District Court for the District of Columbia to enjoin any hearings on the Remand ordered by the Commission and in said action moved for a temporary restraining order. Said action was based upon the grounds, among others, that the Remand deprived Petitioner of its property without due process of law in violation of Amendment V of the Constitution; that following more than four years of investigation and trial it was the duty of the Commission to conclude the case instead of remanding it; that the Order of Remand was issued without any prior notice to respondent; that the Order of Remand violated the Clayton Act, the Administrative Procedure Act and the Commission's Rules of Practice in that it purported to reopen the proceedings after all proceedings were closed without any showing of compliance with the Act and the Rules of the Commission relating to the reopening of proceedings; that the Order was made arbitrarily without any request therefor by the Commission's counsel and with no showing to justify it; that the Order constituted a harrassment of the Petitioner; and that the Order was not consonant with the requirement of impartial conduct of the Commission in that in making it the Commission acted, not in its judicial capacity, but in its prosecuting capacity, thus giving to the Commission's counsel an additional opportunity to sustain its case, when the Commission itself had found that the evidence did not justify any relief against the respondent. The District Court, without passing upon the merits, denied the temporary restraining order, without prejudice, upon the assurance of counsel for the Commission that the evidence to be introduced upon

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the Remand would be limited to evidence specifically designated by counsel and would not result in any protracted or extended proceedings. Thereafter the said action was, upon the consent of the parties, dismissed without prejudice.

11. Hearings on the Remand were held before the Hearing Examiner on December 1 and December 12, 1961. Prior to the commencement of such hearings, Procter moved before the Hearing Examiner for an order dismissing the proceeding on the grounds, among others, that the Commission's Order of Remand was unauthorized and was in excess of its authority for the reasons, among others, set forth in the Complaint filed by the Petitioner in the District Court of the United States for the District of Columbia and summarized in the preceding paragraph hereof. Said motion was denied by the Hearing Examiner and Petitioner duly excepted to such denial.

12. The evidence introduced on the Remand was limited and restricted, in accordance with the Commission's Order of Remand, and consisted mainly of post-acquisition evidence relating to events occurring subsequent to November, 1958 (the closing date of the evidence introduced in the original hearings before the Hearing Examiner). In the light of the Commission's determination that the evidence then in the record was insufficient to support any order against Procter, and the limitations contained in the Commission's Order of Remand, Petitioner introduced no further evidence bearing upon the erroneous findings of the Hearing Examiner based upon the record made in the original hearings.

13. On February 28, 1962, the Hearing Examiner filed his second Initial Decision and again entered an order directing Procter to divest itself of all assets acquired through the acquisition.

Grounds for Relief

14. Procter again appealed to the Commission. The appeal was heard on July 11, 1962. Thereafter the Commission, without determining the issues in the proceeding, and *sua sponte* and on its own motion entered an Order directing a reargument. Such reargument was had before the Commission on January 30, 1963. Supplemental memoranda were then filed, the last such being on March 19, 1963.

15. Thereafter the Commission handed down its Final Order (and Opinion), from which this appeal is taken, dated November 26, 1963, and served upon counsel December 16, 1963. In essence, the Commission's Order (and Opinion), to the extent that it is based upon any evidence at all, is based upon that which was adduced in the course of the original hearings and various inferences which are drawn therefrom. Respecting all issues material to its decision, the Commission has held that the evidence which it, itself, had ordered adduced on the Remand, was irrelevant and immaterial, and has ignored that evidence. It has thus based its decision upon a record completed five years prior thereto and held by the Commission, on the first appeal to it, to be inadequate to support any conclusion that there had been a violation of Section 7. In other words, the Final Order of the Commission is a direct contradiction of the first determination of the Commission, which had declared the same evidence to be insufficient to justify an order against Procter.

III.

GROUND'S FOR RELIEF

16. The Commission's Final Order (and Opinion) is contrary to law and should be annulled, vacated and set aside for the reasons (among other reasons which may be assigned in Petitioner's brief hereafter to be filed in support of this Petition) that:

Grounds for Relief

(a) The Commission's Order and the opinion, findings and conclusions upon which it is based are arbitrary, capricious, not in accordance with law, without statutory authority, unsupported by reliable, competent, probative or substantial evidence, unwarranted by the facts and founded upon erroneous inferences, incompatible with the record as a whole, and were entered in violation of the requirements of due process of law and are in disregard of the provisions of the Clayton Act and the Administrative Procedure Act.

(b) The Commission has failed to make specific findings of fact respecting the evidence in this record, or to specify which of the findings of the Hearing Examiner it accepts or rejects, and has wholly failed to make any findings of fact to support certain of its conclusions and has failed to state adequately, with the simplicity and clarity necessary to inform a reviewing court and the parties, the legal and factual bases for its Order (and Opinion), all as required by the Clayton Act, by the Administrative Procedure Act, and by the requirements of due process.

(c) The evidence taken by and before the Commission shows that none of the assets which the Commission ordered Petitioner to divest was acquired by Petitioner in violation of Section 7 of the Clayton Act, or any other provision of law.

(d) The Commission, in completely disregarding all of the substantial, probative, competent and reliable evidence which supported the lawfulness of the acquisition, denied Petitioner due process of law and violated the requirements of the Administrative Procedure Act.

(e) The Commission's Order (and Opinion) is erroneously based upon purported facts, assumptions, deductions,

Grounds for Relief

arguments and conclusions which are without support in the record in this proceeding, and certain of which are contrary to the uncontradicted and undisputed evidence in such record, and others of which are contradicted by the Opinion itself.

(f) The Commission's Order (and Opinion) is erroneously based upon unwarranted, unsupportable and unfounded speculation, conjecture, surmise and inference, all having no basis or support in the record in this proceeding.

(g) The Commission erred in not reversing and setting aside various erroneous rulings of the Hearing Examiner which, among other things, and over Petitioner's objections, restricted Petitioner's right of cross-examination of various witnesses; excluded material evidence proffered by Petitioner; struck from the record material portions of the testimony of certain of Petitioner's witnesses; and denied Petitioner's motions to strike evidence improperly introduced by complainant. The Commission further erred in disregarding such excluded and stricken testimony proffered by Petitioner.

(h) The Commission's Order (and Opinion) departs from and improperly enlarges upon the issues framed in the Complaint and on the face thereof shows that it is departing from the issues as they were understood by all parties during the trial of this proceeding, in that, among other things, it purports to base its decision in part, at least, upon its determination, without any evidence in support thereof, of a lessening of competition in a "market" or "markets", improperly selected, and wholly different than that alleged in the Complaint and wholly different from that to which the evidence adduced in the hearings was directed or established, all in violation of the Clayton Act, the Administrative Procedure Act and due process of law.

Grounds for Relief

(i) The Commission acted unlawfully and arbitrarily in violation of the Administrative Procedure Act and the Commission's own Rules of Practice for Adjudicative Proceedings, in failing to proceed with reasonable dispatch to conclude its proceedings and in unreasonably prolonging such proceedings to the injury of Petitioner when, after a full trial and a finding by it that the evidence did not show a violation of law, it *sua sponte* reopened and remanded the proceeding for the taking of further evidence, and failed to dismiss the Complaint as its own findings required it to do. The Commission acted in violation of due process in issuing such Order on its own motion without request by any party, without notice of the contemplated action and without any showing of good cause for making the Remand. The error of the Commission, in thus arbitrarily and capriciously protracting the trial of this matter, was compounded by its determination in its final Opinion that the evidence which it, itself, directed to be introduced during the Remand hearings, was irrelevant and immaterial to the decision of the issues raised in the Complaint, and when its Final Order was predicated upon the evidence in the record at the time that the Commission had first reviewed such evidence and held it to be inadequate to support an order against Petitioner.

(j) The Commission considered, and its Order (and Opinion) is based upon matters *de hors* the record in this proceeding, and is based upon opinions, conclusions and extra-judicial material as to which the Petitioner had no notice and as to which no evidence was introduced in said proceeding and as to which Petitioner had no opportunity to reply or otherwise establish the invalidity and erroneous nature of such matters, all in violation of the provisions of the Clayton Act, the Administrative Procedure Act and due process of law.

Relief Prayed

(k) The Commission's Final Order is unwarranted, unjustified and was issued in contravention of the Clayton Act, the Administrative Procedure Act and due process of law.

(1) The Commission's Order (and Opinion) is based upon erroneous interpretations of the meaning, scope and effect of Section 7 of the Clayton Act and erroneous conclusions as to the application of such Act to the facts relating to the acquisition here in issue, and represents an unwarranted effort by the Commission to read into the Act concepts and social, economic and political philosophies at variance with the language of the Act and the intendment of the Congress in enacting it. As support for such erroneous interpretations and conclusions the Commission erroneously relied upon the untested, theoretical and unsubstantiated opinions, philosophies and economic views (certain of which were taken out of context and misinterpreted by the Commission) of writers and theorists who were not offered as witnesses in this proceeding, whose qualifications and experience (practical or otherwise) were never established by examination nor subjected to cross-examination, whose writings and concepts have not been shown to be generally accepted in their field, and whose views, predilections and ideologies are not consonant with the purposes and scope of Section 7, or with the intent of the Congress in enacting such statute, or with the proper functioning of competition in the American system of free enterprise.

IV.**RELIEF PRAYED**

WHEREFORE, Petitioner respectfully prays that this Court:

Relief Prayed

(a) Review the aforesaid proceedings and the Final Order of the Commission entered therein and set aside said Order;

(b) Issue its order directing dismissal of the Commission's Complaint against Petitioner; and

(c) Award such other or further relief as may seem just and proper to this Court.

Respectfully submitted,

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Of Counsel.

Dated: February 13, 1964.

*Docket Entries***RELEVANT DOCKET ENTRIES IN THE MATTER OF
THE PROCTER & GAMBLE COMPANY, DOCKET
NO. 6901 BEFORE THE FEDERAL TRADE COM-
MISSION.**

- 10/7/57 Complaint served.
- 11/4/57 Answer filed.
- 3/10/58 Motion by counsel supporting complaint to set hearing dates and sites.
- 3/26/58 Commission order sustaining appeal from hearing examiner's ruling limiting subpoena.
- 3/26/59 Hearing examiner's order admitting Commission's Exhibit Number 710 A-B into evidence.
- 5/8/59 Proposed findings and conclusions by respondent.
- 5/8/59 Proposed findings, conclusions of law and order by counsel supporting the complaint.
- 6/17/60 Hearing examiner's order closing case.
- 6/17/60 Hearing examiner's initial decision and order of divestiture. (vacated 6-15-61)
- 7/15/60 Notice by respondent of appeal from hearing examiner's initial decision.
- 7/15/60 Notice by counsel supporting complaint of appeal from hearing examiner's initial decision.
- 3/14/61 Argument heard on cross-appeals by counsel from hearing examiner's initial decision.
- 6/15/61 Order vacating initial decision filed June 17, 1960, and remanding case to hearing examiner for further proceedings; and after receipt of additional evidence hearing examiner to file a new initial decision. (Opinion—Commission—attached)
- 11/7/61 Hearing examiner's order scheduling hearing.

Docket Entries

- 1/15/62 Proposed findings and conclusions after remand, submitted by respondent.
- 1/15/62 Additional and restated proposed findings and conclusions after remand by counsel supporting the complaint.
- 2/28/62 Hearing examiner's initial decision and order of divestiture.
- 3/22/62 Petition for review by respondent from hearing examiner's initial decision.
- 4/4/62 Order granting petition for review by respondent from hearing examiner's initial decision.
- 7/11/62 Argument heard on appeal by respondent from hearing examiner's initial decision.
- 11/30/62 Order scheduling reargument on appeal by respondent from hearing examiner's initial decision for January 30, 1963, at 2 p.m., Washington, D.C.
- 12/21/62 Motion by respondent for an order vacating the order for reargument; and motion to dismiss; with exhibit A.
- 1/2/63 Order denying motion by respondent to vacate order for reargument and to dismiss the complaint.
- 1/30/63 Argument heard on appeal by respondent from hearing examiner's initial decision.
- 11/26/63 Final Order (adopting, after modification hearing examiner's initial decision and order of divestiture)
Opinion—Commission—attached
Concurrence—Anderson (concurring in result)
- 12/19/63 Letter from the Secretary of the Commission correcting word in Opinion of the Commission.

*Complaint***UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION***In the Matter of***THE PROCTER & GAMBLE COMPANY,
a corporation,****Docket
No. 6901****COMPLAINT**

(Filed October 7, 1957)

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its complaint, pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21) charging as follows:

PARAGRAPH ONE: Respondent, The Procter & Gamble Company (hereinafter referred to as "respondent") is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at The Procter & Gamble Building, 301 East Sixth Street, Cincinnati, Ohio.

PARAGRAPH TWO: The Clorox Chemical Co. (hereinafter referred to as "Clorox") was, prior to August 1, 1957, a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 850 - 42nd Avenue, Oakland, California.

PARAGRAPH THREE: Respondent, directly and through various completely-owned subsidiary corporations, is engaged principally in the manufacture and sale of packaged soaps and detergents, paper products, shorten-

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ing and other food products, and shampoos, dentrifices and home permanents, which are sold under advertised brand names. The respondent is the leading producer in the United States of soap and detergent products and a major producer in its other principal product fields. The most important consumer household brands which are sold by respondent to retail and wholesale grocery and drug outlets, department stores and variety stores are as follows:

Soaps, Detergents and Cleansers:

Ivory Soap
 Ivory Flakes
 Ivory Snow
 Camay—toilet soap
 Lava—pumice hand soap
 Duz—detergent
 Tide—detergent
 Cheer—detergent
 Dreft—detergent
 Oxydol—detergent
 Dash—low sudsing detergent
 Joy—liquid detergent
 Comet—household scouring cleanser
 Cascade—automatic dishwasher detergent
 Spic and Span—paint and linoleum cleaner
 Zest—toilet detergent bar

Food Products:

Crisco—shortening
 Golden Fluff—shortening
 Big Top—peanut butter
 Duncan Hines—prepared mixes—16 kinds

Toilet Goods:

Crest—fluoridated toothpaste
 Gleem—toothpaste

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Drene—shampoo
Prell—shampoo
Shasta—shampoo
Lilt—home permanent
Pin-It—home permanent

Paper Products:

Charmin—toilet tissue
Lady Charmin—toilet tissue
Charmin—facial tissue
Charmin—napkins
Charmin—towels
Evergreen—industrial paper products

Respondent is also marketing "American Family" soap, flakes and detergents in the greater Chicago area. Selected market areas are being used by respondent to market "Biz" liquid detergent, "Whirl" liquid shortening, "Secret" personal deodorant, "Ivory" liquid detergent, "Jif" peanut butter and "Velvet Blend" shampoo.

Respondent also manufactures soaps, detergents, shortenings and edible oils for sale in bulk quantities to laundries, hotels, institutions, the baking industry and other industrial users; vegetable oils and chemicals chiefly for use in its own products; and by-products, such as glycerine, for sale to industrial users.

Respondent does a substantial manufacturing and marketing business abroad in consumer products similar to those manufactured and marketed in this country. Said business is conducted through completely-owned subsidiary corporations located in Canada, England, Cuba, the Philippines, Indonesia, Mexico, Venezuela, and Belgium.

PARAGRAPH FOUR: Respondent, directly and through its completely-owned subsidiaries, maintains factories for the manufacture of household and industrial

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soaps and detergents, shortenings, toilet goods, edible vegetable oils and food products in the United States at the following locations:

Cincinnati and St. Bernard, Ohio	St. Louis, Missouri
Chicago, Illinois	Long Beach, California
Staten Island, New York	Sacramento, California
Kansas City, Kansas	Portsmouth, Virginia
Macon, Georgia	Quincy, Massachusetts
Dallas, Texas	Iowa City, Iowa
Dayton, Ohio	Jackson, Mississippi
Lexington, Kentucky	Omaha, Nebraska
Baltimore, Maryland	

In addition to the aforementioned locations, respondent and its completely-owned subsidiaries own vegetable oil mills located at Augusta and Macon, Georgia; Charlotte and Raleigh, North Carolina; Montgomery and Selma, Alabama; Corinth and Jackson, Mississippi; Memphis, Tennessee; Little Rock, Arkansas; New Madrid, Missouri; Louisville, Kentucky; Fort Worth, Texas; Baltimore, Maryland; Long Beach, California; and Toronto, Canada. Respondent and its completely-owned subsidiaries also operate chemical pulp plants at Memphis, Tennessee, and Foley, Florida; research facilities at Venice, Ohio; and paper production facilities at Green Bay and West DePere, Wisconsin, and a wood pulp plant at Green Bay.

PARAGRAPH FIVE: Respondent is engaged in the sale of products designated in Paragraphs Three and Four herein in commerce, as "commerce" is defined in the Clayton Act. During the fiscal year ending June 30, 1956, respondent's net sales of such products were \$1,038,290,374. Estimated net sales for the fiscal year ending June 30, 1957, are \$1,148,000,000.

PARAGRAPH SIX: According to the latest information available, respondent accounted for the following per-

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centages of the total United States market in its designated major product fields by value of shipments:

<i>Product Field</i>	<i>Percentage of U. S. Market</i>
Toilet Soaps (bar soaps)	24%
Laundry Soaps (bar soaps)	91%
Package Soap Chips	52%
Package Soap Powders	51%
Liquid Detergents	45%
Packaged Detergents	58%
Shampoos	24%
Toothpastes	34%
Vegetable Shortenings	36%

PARAGRAPH SEVEN: Respondent has increased its size, operations, sales, profits, assets and earned surpluses tremendously in recent years. Since 1946 respondent's net worth, net sales and net profit have increased over 300%. Respondent now employs over 18,000 persons in the United States and over 8,000 persons abroad. Respondent is constantly diversifying its operations and manufacturing and selling new products. Respondent has also entered into the production and sale of additional products by acquiring assets and stock of existing producers of said products. Among such acquisitions in recent years have been the following:

<i>Year</i>	<i>Company</i>	<i>Product or Activity</i>
1955	W. T. Young Foods, Inc.	"Big Top" Peanut Butter and peanut products.
1956	Prepared Mix Division of Nebraska Consolidated Mills, Inc.	Cake mixes.
1956	Hines-Park Foods, Inc.	Distributor of food products, principally cake mixes.

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|------|------------------------------|--|
| 1956 | Duncan Hines Institute, Inc. | Licenses for prestige eating establishments. |
| 1957 | Charmin Paper Mills, Inc. | Paper tissues and related paper products. |
| 1957 | Clorox Chemical Co. | Liquid Bleach. |

Respondent has also acquired numerous soap and detergent companies since 1905. Respondent was originally founded in 1837 and has constantly expanded by acquisition, by integration, and by diversification to reach its present standing.

PARAGRAPH EIGHT: Prior to August 1, 1957, Clorox was engaged in the production and sale of sodium hypochlorite liquid bleach and disinfectant. Said product was sold nationally under the trade name "Clorox," in commerce, as "commerce" is defined in the Clayton Act. In the fiscal year ending June 30, 1956, net sales of "Clorox" were \$36,409,197.70. Net sales of "Clorox" for the fiscal year ending June 30, 1957, were approximately \$40,000,000. Clorox is, and has been for many years, the largest producer of household liquid bleach in the United States. In 1956 Clorox produced and sold approximately 48% of all household liquid bleaches sold in the United States. The number two producer in this field accounted for approximately 16% of all household liquid bleaches sold. The remaining producers, approximately forty in number, accounted for the remaining 36% of sales of household liquid bleach in the United States in 1956. Within the latter group of producers, no single liquid bleach producer enjoyed over 5% of the national household liquid bleach market.

PARAGRAPH NINE: On or after August 1, 1957, respondent acquired Clorox as a going concern, including

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all of Clorox's assets, trade-marks, business and good will. The acquisition was achieved by respondent exchanging $8\frac{1}{2}$ shares of its stock for every 10 shares of Clorox stock outstanding. The market value of respondent's exchanged stock was approximately \$30,300,000. The assets of Clorox were valued at approximately \$15,000,000 at the time of the acquisition.

Under the terms of the acquisition agreements, respondent was given the exclusive right to the name "Clorox." Respondent formed a new Ohio corporation, The Clorox Company, as a completely-owned subsidiary, to commence the manufacture and sale of "Clorox" liquid bleach and transferred the assets and intangibles obtained from Clorox to said subsidiary corporation. The Clorox Chemical Co. was dissolved after its officers distributed respondent's exchanged stock to the stockholders of Clorox Chemical Co. under the ratio of exchange.

PARAGRAPH TEN: Prior to the aforementioned acquisition, Clorox was the dominant factor in the household liquid bleach market. Said position had been achieved through extensive advertising which had made the product "Clorox" well known and accepted in American households. Production of "Clorox" took place at factories in Atlanta, Georgia; Boston, Massachusetts; Camden, New Jersey; Charlotte, North Carolina; Chicago, Illinois; Cleveland, Ohio; Houston, Texas; Jersey City, New Jersey; Kansas City, Missouri; Los Angeles, California; Oakland, California; Seattle, Washington; and Tampa, Florida, prior to the acquisition. These regional production plants enabled Clorox to reduce freight costs of its finished product. Said freight costs are a significant factor in the sale of household liquid bleach.

Clorox had experienced a pattern of constant growth and expansion in the five years prior to the aforemen-

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tioned acquisition and its share of the household liquid bleach market had been constantly increasing. Clorox produced no product in addition to "Clorox" bleach. At the time of the aforementioned acquisition Clorox was dominant in its product market, was operating profitably and its product "Clorox" was firmly established by public acceptance. Said public acceptance and the value of the well known and widely advertised name "Clorox" is demonstrated by the fact that respondent paid Clorox far in excess of the value of Clorox's assets in the acquisition aforementioned, said excess amount representing the value of the trade-name "Clorox" and the good will of Clorox.

PARAGRAPH ELEVEN: Respondent, by virtue of the acquisition of Clorox, has entered a market in which it did not formerly compete or offer a competitive product. Respondent, in so doing, has replaced the dominant factor in that market with its own dominant ability to produce and sell which threatens the household liquid bleach market with extremely adverse competitive effects. Prior to the aforementioned acquisition, Clorox—with assets of approximately \$15,000,000; accumulated retained earnings of approximately \$6,000,000; annual net income of approximately \$2,000,000; and annual net sales of approximately \$40,000,000—was gaining a steadily larger share of the household liquid bleach market as the market share of the other household liquid bleach producers constantly diminished. As a result of the acquisition, said household liquid bleach producers must now compete with respondent—with assets of approximately \$726,000,000; accumulated retained earnings of approximately \$409,000,000; annual net income of approximately \$60,000,000; and annual net sales of approximately 1.2 billion dollars.

PARAGRAPH TWELVE: In addition to its economic strength and ability, as delineated heretofore, respondent

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is a recognized leader in the merchandising of household or grocery store products. The vast majority of respondent's products, and "Clorox," are sold in grocery stores at low prices and in large volume. Such products require consumer acceptance in order to obtain critically short and valuable shelf space in the grocery stores. Such consumer acceptance of these products, especially soaps, detergents, cleansers, bleaches and toilet goods is obtained by extensive advertising. Respondent is the second largest advertiser of all products in the United States, having spent approximately \$79,000,00 for advertising of its products in 1956, utilizing all media and means of reaching the consuming public.

In conjunction with its advertising, respondent has been extremely successful in promoting its household products. Respondent has utilized various promotional devices—including "two-for-one" sales, free samples, price-reducing coupons, reduced prices, and premiums for purchase—to a high degree.

PARAGRAPH THIRTEEN: The ability of respondent to utilize advertising and promotional devices to gain shelf space and to sell its products, as set forth in Paragraph Twelve, has been vividly demonstrated in the recent past. Respondent introduced a new toothpaste, "Gleem," in 1953, and another new toothpaste, "Crest," in 1956. By utilizing its advertising and promotional ability, as aforesaid, "Gleem" had acquired 25% of the toothpaste market by 1955 and "Crest" acquired an additional 13% of said market in its first year of production.

In a field more directly related to liquid bleaches, the household cleanser market, respondent introduced in 1956 a new product, "Comet." By utilizing its advertising and promotional ability, as aforesaid, "Comet" acquired approximately 29% of the household cleanser market by

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March, 1957, nine months after it was first introduced. In said promotions respondent distributed approximately 30,000,000 miniature samples of "Comet" at an estimated cost of 3.3 million dollars.

These examples of the effectiveness of respondent's merchandising and advertising ability and power with new and previously unknown products demonstrate the impact on the household liquid bleach market that respondent, as a result of the acquisition of Clorox, can now accomplish with the already existing, dominant, well-known and established product "Clorox." Said impact will be to the competitive disadvantage of household liquid bleach manufacturers and the household liquid bleach industry.

PARAGRAPH FOURTEEN: Respondent, by virtue of the acquisition, has expanded its line of soaps, detergents and cleansers with a closely allied product, household liquid bleach. While respondent had not, prior to the acquisition of Clorox, produced a product competitive with household liquid bleach, respondent's soaps, detergents, and cleansers are used by housewives in conjunction with, and as a complement to, household liquid bleach. Therefore, respondent can now offer grocery stores a complete line of cleansing and laundry products. Said complete line increases respondent's ability to obtain the aforementioned valuable and difficult to obtain grocery store shelf-space and is to the competitive disadvantage of household liquid bleach companies, none of whom possess the complete line of cleansing and laundry products as respondent now does.

PARAGRAPH FIFTEEN: Respondent has violated Section 7 of the Clayton Act, as amended, in that the acquisition of the assets and business of Clorox, as described in Paragraph Nine hereof, may have the effect

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of substantially lessening competition or tending to create a monopoly in the production and sale of household liquid bleaches in the United States and in each of them.

More specifically, the aforesaid effects include the actual or potential lessening of competition and a tendency to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

1. Actual and potential competition generally in the production and sale of household liquid bleaches may be substantially lessened.
2. The Clorox Chemical Co. has been permanently eliminated as an independent competitive factor in the household liquid bleach industry.
3. Household liquid bleach producers may be unable to compete with respondent due to any one, any combination of, or all of the following factors:
 - (a) Respondent's market position;
 - (b) Respondent's financial and economic strength;
 - (c) Respondent's advertising ability and experience;
 - (d) Respondent's merchandising and promotional ability and experience;
 - (e) Respondent's "full-line" of cleansing and laundry products;
 - (f) Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space;
 - (g) Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability.
4. Respondent's competitive position in the production and sale of household liquid bleaches may be en-

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hanced to the detriment of actual and potential competition.

5. Industry-wide concentration of the production and sale of household liquid bleaches may be increased.
6. The acquisition gives respondent the facilities, the market position and the dominant ability to monopolize or to tend to monopolize the household liquid bleach market.

PARAGRAPH SIXTEEN: The foregoing acquisition, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this 30th day of September A.D., 1957, issues its complaint against said respondent.

NOTICE

Notice is hereby given to the respondent hereinbefore named that the 16th day of December A.D., 1957, at 10 o'clock is hereby fixed as the time and Cincinnati, Ohio as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint and to divest respondent of the acquired assets and properties described in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the

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facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided, and failure to appear at the time and place fixed for hearing, shall be deemed to authorize a hearing examiner, without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed at Washington, D. C., this 30th day of September, 1957.

By the Commission.

/s/ ROBERT M. PARRISH,
ROBERT M. PARRISH,
Secretary.

[SEAL]

*Answer***UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION***In the Matter of***THE PROCTER & GAMBLE COMPANY,
a corporation,****Docket
No. 6901****ANSWER**

(Filed November 4, 1957)

Respondent, answering the complaint herein, alleges:

PARAGRAPH ONE: The allegations of Paragraph One are admitted.

PARAGRAPH TWO: The allegations of Paragraph Two are admitted.

PARAGRAPH THREE: In connection with the first subparagraph, respondent and its subsidiaries are engaged principally in the manufacture and sale of packaged soaps and detergents, paper products, shortening and other food products, and shampoos, dentifrices and home permanents, which are sold under advertised brand names. Respondent is one of the leading producers in the United States of soap and detergent products and it is one of the major producers in its other principal product fields. The most important consumer household brands of respondent are sold by it to retail and wholesale grocery and drug outlets, department stores and variety stores. It is alleged that the various brands of respondent vary greatly not only in their nature and content but also in their respective proportion of the total sales of respondent. In place of the list of the most important brands sold by respondent, shown on page two, the following should be substituted:

*Answer**Soaps, Detergents and Cleaners:*

Ivory Soap—all-purpose bar soap
Ivory Flakes—mild all-purpose flake soap
Ivory Snow—mild all-purpose granulated soap
Camay—hard-milled perfumed toilet soap
Lava—pumice hand soap
Duz—detergent and granulated soap
Tide—heavy-duty detergent
Cheer—heavy-duty detergent
Dreft—light-duty detergent
Oxydol—heavy-duty detergent
Dash—low sudsing heavy-duty detergent
Joy—liquid general purpose detergent
Comet—scouring cleanser
Cascade—detergent for automatic dishwashers
Spic and Span—paint and linoleum cleaner
Zest—detergent toilet bar

Food Products:

Crisco—vegetable shortening
Golden Fluff—vegetable and lard shortening
Big Top—peanut butter and peanuts
Duncan Hines—prepared baking mixes—15 kinds

Toilet Goods:

Crest—fluoridated toothpaste
Gleem—toothpaste
Drene—liquid shampoo
Prell—paste and liquid shampoo
Shasta—cream shampoo
Lilt—home permanent
Pin-It—home permanent

Paper Products:

Charmin—household toilet tissue
Lady Charmin—household toilet tissue

Answer

Charmin—facial tissue

Charmin—paper napkins

Charmin—paper towels

Evergreen—industrial paper towels and tissue

The first sentence of the second subparagraph is admitted. The second sentence is admitted to the following extent: "Biz" liquid detergent, "Whirl" liquid shortening, "Secret" personal deodorant, "Ivory" liquid detergent, "Jif" peanut butter and "Velvet Blend" shampoo are being marketed only in limited areas.

The third subparagraph is admitted.

In connection with the fourth subparagraph, respondent admits that subsidiaries in the countries set forth in such subparagraph manufacture or market abroad products similar to some of the products manufactured and marketed by it and its subsidiaries in this country. However, it is alleged that the fourth subparagraph is irrelevant and immaterial and should be stricken.

Except as herein admitted, each and every allegation of Paragraph Three is denied.

PARAGRAPH FOUR: The first subparagraph is admitted except the first six lines should read as follows: "The factories of respondent and its subsidiaries for the manufacture of household and industrial soaps and detergents, shortenings, toilet goods, edible oils and food products in the United States are at the following locations:"

The second subparagraph is admitted except the first three lines should read as follows: "Respondent and its subsidiaries own vegetable oil mills located at Augusta and Macon," and except that the words "Baltimore, Maryland;" should be eliminated.

Except as herein admitted, Paragraph Four is denied.

Answer

PARAGRAPH FIVE: Respondent alleges that not all of its products were sold in "commerce", as "commerce" is defined in the Clayton Act, and also alleges that the net sales of respondent and its subsidiaries for the fiscal year ending June 30, 1956, were \$1,038,290,374 and for the fiscal year ending June 30, 1957, were \$1,156,389,726. Otherwise, respondent admits the allegations in Paragraph Five.

Except as herein admitted, Paragraph Five is denied.

PARAGRAPH SIX: The allegations of Paragraph Six are denied.

PARAGRAPH SEVEN: The first sentence of the first subparagraph is admitted except that the word "tremendously" is ambiguous and this sentence is, therefore, denied.

The third sentence of the first subparagraph is admitted, with the addition of the words "and its subsidiaries" after the word "Respondent".

As to the fourth sentence, it is admitted that respondent has diversified its operations in some instances.

As to the fifth and sixth sentences of the first subparagraph, respondent admits that it acquired in the year specified the various companies listed on page five of the Complaint, but alleges that Hines-Park Foods, Inc. was concerned with licensing the Duncan Hines trademark for use on various food products and that Duncan Hines Institute, Inc. was concerned with licensing the Duncan Hines trademark for use on household appliances and publishing directories of dining and lodging establishments. Respondent also alleges that the acquisitions of Hines-Park Foods, Inc. and Duncan Hines Institute, Inc. were necessary in order to acquire the Duncan Hines trademark.

The first sentence of the second subparagraph is admitted except that respondent has never acquired a deter-

Answer

gent company and the word "numerous" is ambiguous and this sentence is, therefore, denied.

In connection with the second sentence in the second subparagraph, it is admitted that respondent was founded in 1837, but as a partnership, and that it has expanded from time to time since that date. Such expansion resulted in part from acquisition and from diversification but principally by natural internal growth of respondent, from improvement of its products and from the satisfaction with and acceptance by consumers of such products.

Except as herein admitted, each and every allegation of Paragraph Seven is denied.

PARAGRAPH EIGHT: The first four sentences of Paragraph Eight are admitted.

In connection with this and all subsequent paragraphs, respondent does not admit the legal or practical validity of complainant's "household liquid bleach market."

Except as herein admitted, each and every allegation of Paragraph Eight is denied.

PARAGRAPH NINE: With respect to Paragraph Nine, respondent alleges that on August 1, 1957, pursuant to a Plan of Reorganization, The Clorox Company acquired substantially all of the then existing assets and business as a going concern of Clorox Chemical Co., including without limitation, all of its good will and rights to the use of its name or any variant thereof, and gave solely in exchange therefor 639,578 shares of respondent's fully paid and non-assessable \$2.00 par value common shares. Respondent admits that it incorporated The Clorox Company under the laws of the State of Ohio; that The Clorox Company is a wholly owned subsidiary of respondent and that Clorox Chemical Co. has been dissolved.

Except as herein admitted, each and every allegation of Paragraph Nine is denied.

Answer

PARAGRAPH TEN: In connection with the second sentence of the first subparagraph, it is admitted that the product "Clorox" was well known and accepted in the American households, and that it was advertised. The other allegations in this sentence are conclusory and are denied for lack of information and belief and should be stricken.

The third sentence in the first subparagraph is admitted.

The fourth and fifth sentences in the first subparagraph are conclusory, relative and ambiguous and are denied by respondent for lack of information and belief and should be stricken.

In connection with the first sentence of the second subparagraph, it is admitted that the business of Clorox Chemical Co. has grown in the past five years.

As to the third sentence in the second subparagraph, it is admitted that Clorox Chemical Co. was operating profitably and that its product "Clorox" had public acceptance. The remainder of this sentence is conclusory and ambiguous and is denied and should be stricken.

In connection with the fourth sentence of the second subparagraph, it is admitted that the product "Clorox" had public acceptance and that the trade name "Clorox" had value. It is further alleged that the real value of the assets of Clorox Chemical Co. necessarily and properly included, among other things, the value of its trade name and good will. It is denied that as a result of the acquisition, the Clorox Chemical Co. received in excess of the true value of its assets.

Except as herein stated, each and every allegation of Paragraph Ten is denied.

PARAGRAPH ELEVEN: In connection with the first sentence of Paragraph Eleven, respondent admits that by virtue of the acquisition, respondent has entered a market.

Answer

in which it did not formerly compete or offer a competitive product.

Respondent admits that the figures in the third sentence are approximately those shown by the books of Clorox Chemical Co. except that the book value of the assets (exclusive of good will, etc.) was \$11,731,000 and the accumulated retained earnings were about \$7,013,000. In connection with the rest of this sentence, it is alleged that Clorox Chemical Co. had made gains in sales on a dollar basis but respondent denies for lack of information the allegations as to Clorox' relative share of the market and the relative share of other bleach producers.

The figures stated in the fourth sentence would be approximately correct if stated as follows: As of June 30, 1957, the assets of respondent and its subsidiaries were \$688,272,623; the accumulated retained earnings were \$389,303,033; the consolidated net earnings were \$67,807,376; and the annual net sales were \$1,156,389,726. Respondent denies any inference in the fourth sentence that any competitive burden is or may be placed on other bleach producers.

Except as herein admitted, each and every allegation of Paragraph Eleven is denied.

PARAGRAPH TWELVE: As to the first sentence of the first subparagraph, it is admitted that respondent merchandises the products enumerated in Paragraph Three of its Answer.

As to the second sentence of the first subparagraph, it is admitted that respondent and its subsidiaries sell at low prices and sometimes in large volume as do competitors.

In connection with the third sentence of the first subparagraph, respondent alleges that there is consumer acceptance of and satisfaction with the products of respondent.

Answer

ent and its subsidiaries and that by reason of such consumer acceptance and satisfaction retailers devote an appropriate amount of shelf space to those products and to products of other manufacturers.

In connection with the fourth sentence of the first subparagraph, respondent admits that it advertises its products well. Such advertising contributes to consumer acceptance only if and when such products, in themselves and in relation to competitive products, are satisfactory to the consumer.

The advertising expenditure in the fifth sentence of the first subparagraph is not denied. It is further alleged that respondent uses various media for presenting its products to the consuming public.

In connection with the second subparagraph, respondent admits that it has been successful in the promotion and sale of many of its products and that it has used from time to time for specific products promotional methods including those mentioned in this subparagraph or methods somewhat like them.

Except as herein admitted, each and every allegation of Paragraph Twelve is denied.

PARAGRAPH THIRTEEN: In connection with the first subparagraph, respondent admits that "Gleem" was introduced in 1953 and "Crest" in 1956 and that both were advertised and promoted. Respondent denies for lack of information and belief the alleged percentage of the market of these products.

In connection with the second subparagraph, it is admitted that respondent introduced "Comet" in 1956, that it advertised and promoted "Comet" and that respondent distributed 30,000,000 or more miniature samples at a cost of 3.3 million dollars or more. Respondent denies for lack of knowledge and information "Comet's" alleged percentage of the market.

Answer

In connection with the third subparagraph, respondent alleges that it has on occasion advertised, promoted and sold products which, despite all of its efforts, failed to obtain consumer acceptance and that in several recent instances the products were withdrawn from the market.

The allegations of Paragraph Thirteen are not only conclusory, ambiguous and argumentative but also irrelevant and immaterial to this proceeding and have no proper purpose and should be stricken.

Except as herein admitted, each and every allegation of Paragraph Thirteen is denied.

PARAGRAPH FOURTEEN: In connection with the first sentence, the words "closely allied product" are ambiguous and the sentence is, therefore, denied.

In connection with the second sentence, it is admitted that respondent has not produced a product competitive with household liquid bleach.

In connection with the third sentence, respondent denies that it has a complete line of cleansing and laundry products.

Except as herein admitted, each and every allegation of Paragraph Fourteen is denied.

PARAGRAPH FIFTEEN: Each and every allegation of Paragraph Fifteen is denied and in this connection, respondent alleges that there are and may be factors, totally unrelated to the acquisition of Clorox, which will affect household liquid bleaches. In the case of practically all consumer products, technological advances and changes in consumer preferences affect their future course. This future course and the causes therefor can never be predicted with any accuracy, but such technological advances and changes in consumer preferences are certain to have a much greater effect than changes of ownership of the company involved. This applies specifically to the product

Answer

"Clorox." Neither complainant nor respondent nor anyone else can predict or control the factors which may in the future affect the sales of household bleaches. Three all-important factors, namely, product quality, consumer preferences, and technological advances, are completely ignored in the Complaint.

PARAGRAPH SIXTEEN: The allegations of Paragraph Sixteen are denied.

WHEREFORE, respondent asserts that this proceeding should not be entertained by the Federal Trade Commission; that there is no cause of action against respondent, and no basis in law or fact for any cease and desist or divestiture order or for any other relief against respondent; and respondent therefore prays that this proceeding be dismissed.

THE PROCTER & GAMBLE COMPANY

By /s/ JOSEPH C. DINSMORE
JOSEPH C. DINSMORE

/s/ RICHARD W. TODD
RICHARD W. TODD

/s/ KENNETH C. ROYALL
KENNETH C. ROYALL

/s/ ROBERT D. LARSEN
ROBERT D. LARSEN

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1000 Vermont Avenue, N.W.
Washington 5, D.C.

November 4, 1957.

Motion for the Establishment of Hearing Sites and Dates

[Caption Omitted]

To: Hearing Examiner Everett F. Haycraft

**MOTION FOR THE ESTABLISHMENT OF
HEARING SITES AND DATES**

(Filed March 10, 1958)

COME NOW counsel supporting the complaint and move the examiner that hearings in the above-entitled matter in support of the complaint be scheduled at the following cities:

<i>City</i>	<i>Days Requested</i>
Philadelphia, Pa.	3
Buffalo, N.Y.	3
New York City	5
Chicago, Ill.	2
St. Paul, Minnesota	2
Boston, Mass.	5
San Francisco, Cal.	4
Los Angeles, Cal.	5
Greenville, S.C.	2
Detroit, Mich.	2

It will be noted by the examiner that several cities which we have previously indicated as possible hearing sites are not included in the above list and several new cities have been added. This change is due to the fact that we have not had a sufficient opportunity for a careful analysis of our files in this matter until the last few days. The recommended number of hearing days reflects our attempt to estimate very liberally the always unknown factor of the length of the cross-examination. The cities above represent the maximum number of hearings we can foresee at this point and it is very likely that as the hearings progress, we will find it unnecessary to go to several of these cities. That will be our objective throughout the hearings.

Motion for the Establishment of Hearing Sites and Dates

The hearings for San Francisco are already scheduled to commence April 15 for four days and the Los Angeles hearings are already scheduled to commence April 21 for five days. At this time we believe that, in the absence of an excessively long cross-examination, these dates should be sufficient. However, we would suggest that a hearing room be tentatively reserved in Los Angeles for April 29 and 30 in the event our estimate proves to be insufficient. Hearings on these days will depend, of course, on the return to the West Coast from Washington, D. C. of respondent's counsel from his argument before the Supreme Court on April 28.

Counsel in support of the complaint share the desire of the examiner to conclude the case-in-chief in support of the complaint prior to July 1, 1958. Apparently, respondent also desires to expedite this entire proceeding in every way possible. Therefore, counsel supporting the complaint have reserved the entire time period between April 15 and July 1 for hearings in this matter with two exceptions, which were previously scheduled. Those exceptions are an oral argument before the Commission on May 1, 1958, and defense hearings in Docket 6670 the entire week of June 9, 1958.

We would appreciate that the dates for the requested hearings be established at an early date in order that we might notify our prospective witnesses, many of whom will desire to arrange their appearance so as not to conflict with business and vacation plans, especially during the month of June. It is suggested that the hearings for Chicago and St. Paul be scheduled for the same week and the hearings for Detroit and Philadelphia be scheduled for the same week. It is further suggested that the Buffalo and Boston hearings be scheduled for one trip, or if a

Order Sustaining Appeal from Hearing Examiner's Ruling

longer trip is agreeable, that the New York City, Boston and Buffalo hearings be scheduled for one trip.

All of the requested hearing dates herein are subject, of course, to the convenience of all parties and counsel supporting the complaint stand ready to cooperate in that respect.

Therefore, it is respectfully moved that the above-requested hearing sites and dates be established for the completion of the Commission's case-in-chief. The only addition to this proposed schedule which occurs to us is that a return trip to Cincinnati may be necessary if the interlocutory appeal now pending before the Commission is ruled on favorably to counsel supporting the complaint.

Respectfully submitted,

/s/ WILLIAM R. TINCHER
WILLIAM R. TINCHER,

/s/ THOMAS A. DEVENY, III
THOMAS A. DEVENY, III,

Counsel Supporting the Complaint.

March 10, 1958.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

JOHN W. GWYNNE, *Chairman*
ROBERT T. SECREST
SIGURD ANDERSON
WILLIAM C. KERN
EDWARD T. TAIT

In the Matter of

THE PROCTER & GAMBLE COMPANY,
a corporation.

Docket
No. 6901

*Order Sustaining Appeal from Hearing Examiner's Ruling***ORDER SUSTAINING APPEAL FROM HEARING
EXAMINER'S RULING LIMITING SUBPOENA**

(Issued March 26, 1958)

This matter having come on to be heard upon an interlocutory appeal filed by counsel in support of the complaint from the hearing examiner's rulings granting in part the respondent's motion to limit or quash a subpoena duces tecum theretofore served on the respondent; and

It appearing that the effects of the rulings are to exclude from the subpoena as irrelevant to any of the issues in this proceeding the respondent's records showing its domestic acquisitions from 1946 to the date of the subpoena, its advertising and promotional expenditures, including designated surveys and advertising research reports, concerning certain products recently acquired or developed by the respondent, for the years 1952 through 1957, and the records of The Clorox Chemical Company showing its domestic acquisitions from 1952 through 1957; and to limit to material actually used in 1956 and 1957 the subpoena's demand for production of The Clorox Chemical Company's 1952-1957 records showing the company's merchandising practices, the prices of its products, the geographical areas served by each of its producing facilities and the dollar volume sales in each such area, and samples of the labels and wrappers used on each of its products; and

The Commission having considered the matter in the light of all of the circumstances, including the allegations of the complaint, with particular reference to the nature of the acquisition charged to have been unlawful and the scope of the inquiry concerning the potential effects on competition which is necessary, and having reached the conclusion that the records and documents excluded from

Order Receiving Exhibit Into Evidence

the subpoena are generally relevant to the basic issues involved in the proceeding and, further, that a requirement for their production need not expand the case beyond manageable proportions:

IT IS ORDERED that the hearing examiner's rulings granting in part the respondent's motion to limit or quash the subpoena as aforesaid be, and they hereby are reversed, it being understood, however, that this does not constitute a ruling on the respondent's contention that the requirement for the production of certain of said records and documents is an unreasonable burden on the respondent and involves an unnecessary disclosure of its trade secrets, or a determination of the admissibility of any of the records or documents into the record as evidence, neither of which questions was involved in the appeal.

By the Commission.

/s/ ROBERT M. PARRISH
ROBERT M. PARRISH,
Secretary.

[SEAL]

ISSUED: March 26, 1958

[Caption Omitted]

ORDER RECEIVING EXHIBIT INTO EVIDENCE

(Filed March 26, 1959)

This matter comes on to be heard on motion of counsel supporting the complaint, filed on March 17, 1959, to receive Commission Exhibit 710 A-B into evidence pursuant to ruling of the Hearing Examiner at record page 6028 wherein he reserved that Commission exhibit number for certain statistical data coming from the American Stores Company, Philadelphia, Pennsylvania, and which

Proposed Findings of Fact and Conclusions

appears attached to said motion in the form of a letter signed by A. E. Gilfillan, Legal Department, American Stores Company, as to whom a stipulation had been made with respect to similar data (R. 6029-6031), said letter being on the letterhead of the American Stores Company dated March 12, 1959, addressed to Thomas A. Deveny, III, Trial Attorney, Federal Trade Commission, and purporting to furnish purchases by cases and dollar amounts of Speedup, 101 and Clorox for the two respective periods January 1, 1957, through November 30, 1957, and January 1, 1958, through November 30, 1958, this data being offered in rebuttal of the testimony of Mr. George Bennett. It appears to the Hearing Examiner that the proposed exhibit complies with the statement made on the record at the time Exhibit No. 710 was reserved. Accordingly,

IT IS ORDERED that the photostatic copy of the letter of A. E. Gilfillan dated March 12, 1959, addressed to Thomas A. Deveny, III, hereinbefore described, be, and the same hereby is, received in evidence as Commission Exhibit 710 A-B.

/s/ EVERETT F. HAYCRAFT
EVERETT F. HAYCRAFT,

Hearing Examiner.

March 26, 1959.

[Caption Omitted]

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS
FILED BY RESPONDENT, THE PROCTER
& GAMBLE COMPANY**

(Filed May 8, 1959)

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Proposed Findings of Fact and Conclusions

[Caption Omitted]

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS
FILED BY RESPONDENT, THE PROCTER & GAMBLE
COMPANY**

(Filed May 8, 1959)

To The Honorable Everett F. Haycraft, *Hearing Examiner*:

Pursuant to Rule XIX of the Rules of Practice of the Federal Trade Commission, the respondent, The Procter & Gamble Company, in the above entitled proceeding, by its attorneys, submits to the Hearing Examiner its proposed findings of fact and conclusions for his consideration and respectfully requests that the Hearing Examiner find the facts accordingly and include these proposed findings and conclusions in his initial decision as his findings and conclusions.

The proposed findings are based directly on the record references cited in support thereof.*

(i) STATEMENT OF THE PROCEEDINGS

The Complaint in this proceeding was issued on September 30, 1957, charging that The Procter & Gamble Company had violated and was violating Section 7 of the Clayton Act (U. S. C. Title 15, Sec. 18) as amended December 29, 1950, by its acquisition on August 1, 1957, through its wholly-owned subsidiary, The Clorox Company, of the assets and business of Clorox Chemical Co. Specifically, the Complaint alleged that the acquisition "may have the effect of substantially lessening competition or

* "Tr." as hereinafter used refers to the Stenographic Transcript of the record in this proceeding. Citation to testimony is by name of the witness and the page of the transcript.

"CX" as hereinafter used refers to Commission's Exhibits.

"RX" as hereinafter used refers to Respondent's Exhibits.

Statement of the Proceedings

tending to create a monopoly in the production and sale of household liquid bleaches in the United States."

In its Answer, filed November 4, 1957, respondent denied all charges of illegality contained in the Complaint.

The taking of evidence commenced in Cincinnati, Ohio, on December 16, 1957. Additional hearings were held in San Francisco, Los Angeles, Chicago, Philadelphia, New York, Boston, Buffalo, Detroit and Washington, D. C. Complainant closed its case-in-chief on August 26, 1958.

Respondent presented its case at hearings held in Washington, D. C. on November 17-26, 1958 and January 5-9, 1959.

Complainant's rebuttal case was presented in Washington, D. C. commencing January 26, 1959.

The hearings were concluded on February 12, 1959, when each party stipulated that its case was closed.

[Note: Respondent's case was closed insofar as it involved its understanding of all issues and contentions raised by complainant. In an effort to insure that all matters relied upon by complainant would be directly in issue, respondent requested from time to time that complainant be required to furnish a full and detailed statement of its contentions (see, for example, Tr. 3874-79; 3909-11; 5007). The complainant has not made or purported to make such a statement.

Furthermore, the complainant has not stated or purported to state its full contentions with reference to and based on many of the numerous documents which have been introduced in evidence, and in many cases has failed to designate the parts of the documents upon which it relies (see, for example, Tr. 1615-18).

While the Hearing Examiner has not required the complainant to make, during or at the close of the hearing, a full statement of its contentions, he has

Statement of the Proceedings

ruled that if the complainant raises any issue or makes any contention which was not called to the attention of the respondent, the respondent may have an opportunity to answer any such issue or contention, if not actually anticipated or contemplated (Tr. 3914-15).

As to documents, the Examiner ruled during the hearings that the respondent should be immediately advised of the purpose of any document if such purpose had not previously been stated (Tr. 930-31; 1134-35; 3849-50). Furthermore, the Examiner has stated that he will not permit any "ambush" or surprise (Tr. 3914-15; 5362).

If it should occur that complainant does advance contentions not heretofore raised or made clear to the respondent, request will be made to the Hearing Examiner for permission to file supplemental findings as to these contentions. Furthermore, if the purpose of documents or the designation of the parts to be relied on or the contentions to be made thereunder have not been stated, and are referred to in the complainant's proposed findings or briefs, the respondent will ask, first, that these documents and the contentions thereunder be ignored or, if this is not so ordered, that respondent be permitted to file supplemental findings relating to the matters not previously designated or called to the respondent's attention.

While the Hearing Examiner's rulings are broad enough to cover the introduction of further evidence on the part of the respondent as to any such matter, contention or document, every effort will be made to avoid such course in order that the final disposition of the proceeding may not be delayed.]

(ii) PRELIMINARY STATEMENT

In submitting the following proposed Findings of Fact we think it in order preliminarily to state our concept of the issues to which the Findings are directed.

Preliminary Statement.

A. The legality of the acquisition here in question must be tested in the light of its probable *future* effect on the bleach industry as that industry existed at the time of the acquisition. In other words, the pre-acquisition market position of Clorox Chemical and all other aspects of its business must be accepted as perfectly legal and proper. Likewise the market trend of Clorox, established over the years, must be considered proper, lawful and one which would have probably continued regardless of the acquisition.

This initial premise is particularly indisputable in this case. For here there is no suggestion that Clorox Chemical in attaining its position ever resorted to any improper conduct or ever engaged in any exclusionary or predatory practices. Nor did it achieve its position by the acquisition of any competing companies.

Thus the fact that Clorox Chemical, at the time of the acquisition, had the largest single share of the liquid bleach business in the United States and that such share was steadily increasing, is without significance as such.*

B. In gauging the effects of the acquisition under Section 7, the starting point must be whether there is a *reasonable probability* that Procter's acquisition of Clorox, as distinguished from Clorox's continued independent operation, would substantially lessen competition or tend to

* As succinctly stated by the Hearing Examiner (Tr. 2591-2):

"As I pointed out numerous times, what we are interested in is what the situation was at the time that this acquisition took place. We certainly can't hold the respondent responsible for competitive conditions in this industry before it acquired the Clorox Co."

"Mr. Tincer: * * * as we allege in our complaint and as I believe the evidence is showing, the Clorox Chemical Company on its own, without the aid and assistance of Procter & Gamble was gradually pulling away from the liquid bleach market."

"Hearing Examiner Haycraft: So what? We can't hold the respondent responsible for that."

Preliminary Statement

monopoly. We emphasize that the question is not one of the mere *possibility* that the forbidden effects might occur. This is apparent from the wording and background of Section 7 itself. The Commission, *In the Matter of Pillsbury Mills, Inc.*, 50 FTC Decisions, 555, at 568, adverted to this, saying:

"The House and Senate Committees also took the occasion to make clear that 'may be' means reasonable 'probability' not 'possibility.'"

And quoting from the Senate Report the Commission, at p. 569, said:

"The use of these words ['may, be'] means that the bill, if enacted, would not apply to the mere possibility but only the reasonable probability of the prescribed [sic] effect, as determined by the Commission * * *"

The rationale of this distinction is apparent. The Congress never intended that the applicability of Section 7 was to be determined on the basis of abstract guesswork as to what might be possible. If such a nebulous standard were adopted, there could always be conjured up "possibilities", without relation to realities, which would condemn any merger.

So here the initial approach must be whether, in the light of Clorox Chemical's existing position at the time of the acquisition the complainant has shown, by a preponderance of the evidence, that there is a reasonable probability that the proscribed adverse competitive effects would *be caused by and would be attributable to the acquisition.*

C. It is in the light of the foregoing considerations that the question of "power" must be considered. The Hearing

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Examiner has commented from time to time during the hearings upon the relevancy of Procter's "power" in relation to the business and activities of Clorox. But in using the term "power", and evaluating its significance here, it is essential to define the sense in which the word is used.

1. In the first place, we regard it as self-evident, but legally immaterial, that Procter now has the "power", as the sole stockholder of Clorox, to control its management and operations. This is simply the obvious result which flows from the corporate ownership of any subsidiary company. Plainly, such "power", in and of itself, is decisive of nothing respecting anti-competitive effects.

2. Nor can the word "power" be applied in any determinative sense under Section 7 to a situation in which the acquiring company has much larger total financial resources than the company which has been acquired. Comparative balance sheets are not the standards by which an acquisition is to be judged under Section 7. For had this been intended, Congress could very simply have said that no larger company could ever acquire a smaller one. And, moreover, in this proceeding, under such a test, the matter could have been decided on the pleadings. So we emphasize that "reasonable probability" of anti-competitive effects cannot be inferred or presumed by reason of the fact that the business of the acquired company may have available to it additional financial means.

Even if the law were otherwise, it would not be applicable in this case. For Clorox Chemical was not a company which sought or needed any increased financial support from Procter. The evidence clearly establishes that Clorox Chemical was an eminently successful company; that its operations had been profitable; and that, at the time of the acquisition, it had more than adequate surplus funds

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to enable it to promote and expand its business to any extent which its management could reasonably consider appropriate or desirable.

We submit, therefore, that it cannot be concluded that any theoretical "power" stemming from the availability of unrequired and unnecessary financial reserves is evidence of a violation of Section 7. As said by Examiner Hier *In the Matter of Union Carbide* (August 18, 1958):

"All that is here essentially, is that in this market two commercial strangers have united and the product of one, sausage casings, now has the financial backing of a billion and a half dollars of assets (1957) instead of something less than 100 million formerly, and that, ergo, this financial power can be used to drive everyone else out of the market. Such a forecast on this loose and spotty record calls for a temerity and clairvoyance which I do not possess. The verdict is a Scotch one—not proved, and accordingly the motion to dismiss this portion or charge of the complaint is well taken and will be granted."

In fact, the Hearing Examiner in the instant case struck, as irrelevant, Mr. Morgens' testimony that the financial status after the acquisition did not furnish to Clorox any needed or usable resources or provide it with any competitive "power" that it did not already have.

3. There remains, we believe, only one possible concept of "power" which could be significant in the determination of this case. That concept is indicated in the following determinative questions, i.e.: What has the acquisition of Clorox Chemical by Procter injected into the liquid bleach industry which points to any reasonable probability of anti-competitive effects? What added "power" is there which might reasonably be applied so as to lessen competition or tend to monopoly?

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The burden upon complainant to establish such "power" by more than mere speculation is magnified by the nature of this acquisition. For here, there is no contention that there are any direct anti-competitive effects on the "horizontal" level (a controlling factor in most decisions under Section 7). The element of the absorption or elimination of a competitor, which automatically results in some lessening of competition and some increase in the market position of the acquiring company, is wholly lacking. Nor is there any contention that the acquisition could have any effect on the "vertical" or customer-supplier level.

We are thus left with the necessity of determining whether, in this instance of a "conglomerate merger", the evidence can be said to sustain complainant's burden of proof as to the claimed violation.

In this evaluation of the evidence we urge again that the concept of what is "reasonable" must be an all-important factor. This is true whether the evidence is considered in terms of "probabilities" or "power". For in assaying either point it must be assumed that any "power" which could be said to flow from the acquisition would be exercised *reasonably* and in line with good business judgment—not capriciously, recklessly or maliciously.

D. Consequently, our proposed Findings are directed to those lines of inquiry which deal specifically with every contention and implication advanced by complainant as to the respects in which any anti-competitive effects might probably be anticipated. We here set forth those general lines of inquiry *—the answers to which, as we view it, must be controlling of the decision in this matter.

* Embraced in the following lines of inquiry are all of the claims set forth in Paragraph Fifteen of the Complaint as to the respects in which the acquisition might effect a substantial lessening of competition or tendency to create a monopoly.

Preliminary Statement

1. Is there a reasonable probability that the acquisition will have any anti-competitive effects in the manufacture of liquid bleach?

[Note: The evidence which we will cite in the following Findings shows that the acquisition has added nothing to Clorox's manufacturing facilities or capacities. There is no evidence that it has or will result in any diminution of manufacturing or shipping costs, or will furnish any needed manufacturing capacity, or any other advantages. There are no patents held by either Clorox or Procter affecting the manufacture of liquid bleach. Engaging in the manufacture of this product is a relatively simple and inexpensive operation and there are numerous companies of varied financial status engaged in the business.]

2. Will the acquisition result in advantages in the marketing of liquid bleach which would not have been available had the acquisition not occurred, and which will adversely affect the ability of other bleach producers to compete?

[Note: The evidence to which we will refer establishes that the acquisition has added nothing to Clorox's marketing capacity. It is uncontradicted that no marketing "power" attaches to Clorox through any "full line forcing" resulting from a combination of Clorox and other Procter products.** The same applies to any added ability to "command" or secure shelf space or "in-store" displays, or to enhance Clorox's position by any "tie-in" with Procter products. The evidence also rebuts any suggestion that Clorox has secured any prestige or added consumer acceptance because of its association with Procter. In addition, such evidence as there is in the record on the

** Indeed, we think that complainant itself has actually abandoned any charges it may have had in mind in this connection.

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subject refutes any contention that any change in Clorox's established method of distribution [i.e., through brokers rather than direct salesmen] would produce any advantages or is probable.]

3. Has Clorox obtained any significant advantages in advertising or promotion which were not available to it in the absence of the acquisition?

[Note: There is no evidence that by reason of the acquisition Clorox has acquired any unique advertising or promotional "know-how" or techniques. As subsequent record references show, there is no question but that every advertising and promotional device which anyone has suggested as being appropriate for liquid bleach has been well known and available for many years. Furthermore, the history of Clorox Chemical prior to the acquisition demonstrates that its own advertising and promotional activities in the liquid bleach industry had been most effective and had enabled it to secure and maintain an established position. There is no evidence that its acquisition by Procter has or can in any wise enlarge or expand Clorox Chemical's demonstrated ability in these respects.]

4. Has Clorox's financial ability to advertise and promote its product been enhanced so as to point to a reasonable probability that any anti-competitive effects would result?

[Note: The evidence to which we hereinafter advert shows that Clorox's position has in no way been advanced by the fact that additional funds may theoretically be available for advertising and promotional expenditures. It shows that Clorox Chemical before the acquisition had adequate surplus funds to finance any reasonable program. Further, it shows that the

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"per case" expenditures of Clorox Chemical have proved adequate on the basis of past experience, and that no increase is considered desirable or is contemplated. While the evidence shows that certain savings will result, in connection with TV and other advertising media, such savings are of no consequence in relation to over-all advertising expenditures and cannot be said to afford any substantial advantage. In fact, such savings are considerably less than increases in advertising costs which have occurred since the acquisition.]

5. Is there a reasonable probability that, *because of the acquisition*, Clorox's market position will be improved so as to affect the ability of other producers to compete?

[Note: The evidence is uncontradicted that in the five years prior to the acquisition Clorox's absolute sales and its share of the total sales of household liquid bleach in the United States had steadily and consistently increased. The evidence also shows that total sales by all producers of household liquid bleach in the United States has steadily and consistently increased and that this trend has continued in the year after the acquisition. We, therefore, think it reasonable to assume that had there been no acquisition the Clorox market position would have improved as had been the case in the preceding four years.

In the light of this background, and treating with twelve months subsequent to the acquisition [and the same applies to all of the evidence subsequent to the acquisition], it is abundantly clear that the acquisition has in no wise enhanced Clorox's position or adversely affected the business of its competitors. Indeed, Clorox's market share in the year subsequent to the acquisition of 0.3% is relatively so small as to be almost *de minimis*].* Moreover, this small increase is

* Even if Clorox's market share increase had been much greater, this would simply conform to the trend which had been in effect prior to the acquisition.

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substantially less than the steady increases in each of the four years prior to the acquisition.

The record also shows that in the year following the acquisition the dollar sales of liquid bleach by Clorox's largest competitor increased more than \$1,200,000—the largest increase in the business of that competitor in any of the preceding five years. In addition, the uncontradicted statistical evidence shows that the dollar sales of all other competitors, as a group, increased in the year subsequent to the acquisition, and that the market shares of such competitors were substantially unchanged.

These facts must also be evaluated in the light of the evidence which shows that, in the period subsequent to the acquisition, Clorox engaged in various added promotional plans and programs to meet growing competitive efforts of other producers. This evidence and the explicit testimony of respondent's witnesses effectively rebuts any implication that there has been any "holding back" because of the pendency of this proceeding.]

The foregoing sets forth our analysis of the controlling issues. In certain respects the evidence introduced by both parties related to other subordinate issues, some of which will also be the subject of proposed Findings. Basically, however, we believe that the decision here must be determined by the answers to the inquiries set forth above. And in arriving at those answers we urge that vague, abstruse and unsupported speculations by complainant or by Clorox's competitors are no substitute for proof.

E. We conclude this Preliminary Statement by the following comparison of the factors which have been found to be controlling in other Section 7 cases which have been before the Courts and the Commission and those which are present here:

Preliminary Statement

1. *The removal of a substantial competitor.* Where this factor exists it, of course, has resulted in the deprivation of the consuming public of the benefit of pre-existing competition.

No such element is present in the instant case.

2. *Increased share of market resulting from the acquisition.* The acquisition of a competitor necessarily increases the combined market share of the acquired and acquiring company.

In the instant case the acquisition, as such, in no way added to Clorox's volume of business or market share.

3. *Entries in the market.* In certain cases there has been evidence of a substantial diminution in the number and business of competitors, sometimes because of aggressive competitive practices made possible by the acquisition.

In the instant case there is no proof that there have been any substantial withdrawals from the market. Nor is there any evidence that sales of competitors have declined or have been affected by reason of the acquisition. To the contrary, there have been increased sales by and expansions on the part of existing competitors.

4. *Lessening of competition.* In certain instances it has been found that the number of competing products has been reduced by reason of promotional activities stemming from the acquisition. There has also been the factor that lessening of competition has resulted from competitive methods described as "predatory" or "guerrilla" which resulted "by reason of the acquisition."

In the instant case there is no evidence that there has been any diminution in the number of independent brands of bleach offered for sale in chains and supermarkets. Nor is there any proof that independent competitors have been or probably will be prevented from competing for consumer preference. In addition, the policies and practices

Preliminary Statement

used in the marketing of Clorox, both before and after the acquisition, negate any probability of any "predatory pricing" or other unfair practices.

5. *Oligopolistic aspects of an industry have been increased.* In certain cases it has been noted that the acquisition would further advance oligopolistic tendencies in an industry.

In the instant case, of course, the acquisition in no wise affected the structure of the bleach industry from the standpoint of oligopoly, or otherwise. Procter simply took over the position of Clorox. Nothing was added by the acquisition.

6. *Increase in "economic concentration."* We submit that "economic concentration," as used in decisions in Section 7 cases, relates solely to concentration within the particular industry or line of commerce claimed to be affected. It is the type of concentration brought about, for example, by the proposed combination of two of the largest units in the steel industry. It is also illustrated by the combination of two of the largest units in the family flour industry.

It is obvious that no such "concentration" in the bleach industry has resulted from the acquisition here in issue. We think it plain that the word "concentration" in its Section 7 sense cannot properly be applied to a situation in which one company in an industry is acquired by another company which is not a competitor and is in no way engaged in that industry. In other words, no proscribed "concentration" results from the simple fact that an acquisition results in greater combined assets for the acquiring company.

We maintain that the foregoing considerations point up the failure of complainant here to sustain its burden of proof or to establish that there has been any violation of Section 7.

*Proposed Findings of Fact***PROPOSED FINDINGS OF FACT****I. Description of the Respondent**

1. Respondent, The Procter & Gamble Company ("Procter") is a corporation organized under the laws of the State of Ohio with its office and principal place of business in Cincinnati, Ohio.

Record support: Complaint and Answer, Par. 1.

2. Procter and various of its subsidiaries are engaged principally in the manufacture and sale of soaps and detergents. They also manufacture and sell some food products (including meat food products), paper products, shampoos, dentifrices and home permanents.

Record support: Complaint and Answer, Par. 3.

3. Procter is the largest producer in the United States of soap and detergent products and one of the major producers in its other principal product fields.

Record support: Morgens, Tr. 458; Complaint and Answer, Par. 3.

4. The more important consumer household brands manufactured by Procter and its subsidiaries are sold to retail and wholesale grocery and drug outlets, department stores and variety stores.

Record support: Complaint and Answer, Par. 3.

5. Procter is one of the leading national advertisers in the United States and expends large sums of money in advertising and promoting many of its products in the household soap, detergent, food and toilet goods fields, as do other companies engaged in producing like products.¹

Record support: ¹ CX 447; Stoneman, Tr. 1629-36, Tr. 1830-35; Complaint and Answer, Par. 3.

Proposed Findings of Fact

Procter's overall expenditures for the advertising, in the United States, of approximately 35 products² manufactured by it and sold under brand names were somewhat in excess of \$79,000,000³ (the figure alleged in the complaint) for its fiscal year 1957.

Record support: ² Complaint and Answer, Par. 3.

³ Complaint and Answer, Par. 12; CX 342.

6. As of June 30, 1957, Procter had 19,868,664 shares of stock outstanding; had total assets of \$688,272,623; liquid assets¹ of \$104,149,569; liabilities of \$218,575,677; prior earnings invested in its business of \$389,303,033; and for the year ending June 30, 1957 had consolidated net earnings of \$67,807,376.²

As of June 30, 1958, Procter had 20,561,465 shares of stock outstanding; had total assets of \$755,991,432; liquid assets of \$106,133,986; prior earnings invested in its business of \$421,567,210; liabilities of \$221,434,005; and for the year ending June 30, 1958 had net consolidated earnings of \$73,196,618.³

[Note: As indicated by the foregoing proposed finding, Procter is, of course, a "large" company. It is our position that "financial bigness" as such is in no way determinative of any issue properly raised in a Section 7 case. This was pointedly stated *In the Matter of Union Carbide*, where the acquiring company had assets of a billion and a half dollars. The financial resources of the acquiring company can have significance only when there is proof that the business of the acquired company needed or could profitably use access to increased assets, or that there was a reasonable

Record support: ¹ Determination of liquid assets is arrived at by adding cash and marketable securities.

² Respondent's Answer, Par. 11; CX 6, pp. 6, 8, 9, 10.

³ CX 702, pp. 6, 8, 9, 10.

Proposed Findings of Fact

probability that such increased assets would be used to bring about a lessening of competition or a tendency to monopoly. The proof is to the contrary in this case.]

7. Such increase in size as Procter has enjoyed over the years in its principal product fields has been largely the result of internal growth and it has made no acquisitions in such fields since World War II. The only acquisitions which Procter has made since the end of World War II (other than the acquisition of Clorox Chemical Co.) have been three in number and have been in fields in which Procter had not theretofore been engaged, to wit, W. T. Young Foods, Inc. (peanut butter and peanut products), Duncan Hines (Nebraska Consolidated Mills, baking mixes), and Charmin Paper Mills, Inc. (paper products). There is no proof that any of such acquisitions account for any substantial part of Procter's business.

Record support: Complaint and Answer, Par. 7; Morgens, Tr. 473, 636, 645, 649; CX 6, p. 3.

8. There is no proof that any of Procter's acquisitions referred to in Finding 7 above have resulted in any lessening of competition or any tendency to monopoly in respect of any of the lines of commerce or in any of the markets in which Procter is engaged in business.

9. There is no proof that in achieving or maintaining its position in the fields in which it transacts business, Procter ever engaged in any improper, predatory or exclusionary practices.

II. The Challenged Acquisition of Clorox Chemical Co.

A. DESCRIPTION OF CLOROX CHEMICAL CO.

10. The Clorox Chemical Co. ("Clorox Chemical") was, prior to August 1, 1957, a corporation organized un-

Proposed Findings of Fact

der the laws of the State of Delaware, with its office and principal place of business in Oakland, California.

Record support: Complaint and Answer, Par. 2.

11. Clorox Chemical, prior to August 1, 1957, was engaged in the production and sale of 5¼% sodium hypochlorite liquid bleach and disinfectant under the trade name "Clorox".

Record support: Complaint and Answer, Par. 8; Morgens Tr. 492.

12. At that time, and since at least 1952, Clorox Chemical was the largest producer of household liquid bleach in the United States.

Record support: Complaint and Answer, Par. 8; Morgens, Tr. 483; Trimpe, Tr. 4238.

13. Clorox Chemical had thirteen plants for the manufacture and bottling of household liquid bleach, located at Atlanta, Georgia; Boston, Massachusetts; Camden, New Jersey; Charlotte, North Carolina; Chicago, Illinois; Cleveland, Ohio; Houston, Texas; Jersey City, New Jersey; Kansas City, Missouri; Los Angeles, California; Oakland, California; Seattle, Washington; and Tampa, Florida.

Record support: Complaint and Answer, Par. 10.

14. Net sales of Clorox Chemical for the fiscal years ended June 30, 1952 through June 30, 1957 were as follows:

1952	\$23,625,026
1953	\$27,714,435
1954	\$30,284,650
1955	\$33,874,181
1956	\$36,409,197
1957	\$39,999,114

Proposed Findings of Fact

The foregoing net sales figures represent almost entirely sales of household liquid bleach which, with the exception of a small amount of industrial bleach, has always been Clorox Chemical's only product.

Record support: CX 7, 8, 9, 10, 11 and 12; Morgens, Tr. 493.

15. The net sales of Clorox Chemical reflect a steady, continuous and substantial growth in each of the years during the period 1952 through June 30, 1957.

Record support: Complaint and Answer, Par. 10; CX 7, 8, 9, 10, 11 and 12.

16. In each of the years during the period from August 1, 1952 through July 31, 1957, there was a steady and continuous growth in Clorox Chemical's market share of all household liquid bleach sold in the United States through grocery stores. Such market shares were as follows;

<i>Year Ending July 31</i>	<i>Clorox Brand Share</i>	<i>Change in Share</i>
1953	45.3%	—
1954	46.4%	1.1%
1955	47.1%	0.7%
1956	47.7%	0.6%
1957	48.4%	0.7%

[Note: This steady and continuous growth in market share, and the rate of such growth, must be contrasted with the growth in market share in the year following the acquisition. As will appear in subsequent findings, such increase was only 0.3% of one Nielsen competitive point. As is evident from the above figures, this was the lowest increase experienced by Clorox Chemical in the entire period from 1952 through July 31, 1957; and represented only

Proposed Findings of Fact

one-half or less of the growth experienced in any one of the prior five years.]

Record support: RX 94.

17. As of June 30, 1957, Clorox Chemical had liquid assets of \$3,900,047 and an earned surplus of \$7,127,015.

Record support: CX 12, p. 2; Determination of liquid assets is arrived at by adding cash and marketable securities.

18. There is no proof nor is there any claim that Clorox Chemical ever acquired a competing liquid bleach company or any other company. There is no proof nor is there any claim that its growth and the achievement of its position in the bleach industry were due to any factors other than the industry, resourcefulness and ability of its founders and executives.

19. There is no proof nor is there any claim that Clorox Chemical in achieving or maintaining its position in the bleach industry ever engaged in any improper, predatory or exclusionary practices.

B. THE ACQUISITION AGREEMENT AND THE PRICE PAID

20. Pursuant to an agreement dated May 28, 1957 between Clorox Chemical and Procter, Clorox Chemical agreed to exchange and transfer substantially all of its assets and business as a going concern to Procter on the terms, conditions and provisions set forth in such agreement. Said agreement provided, among other things, that the closing of such exchange and transfer, subject to prior approval by Clorox Chemical's stockholders, would be August 1, 1957.

Record support: CX 27.

Proposed Findings of Fact

21. To implement the transaction Procter caused a wholly-owned subsidiary named The Clorox Company ("Clorox") to be incorporated under the laws of the State of Ohio. On August 1, 1957, this subsidiary, pursuant to the plan of reorganization set forth in the said agreement, exchanged 639,578 shares of Procter's fully paid and non-assessable \$2 par value common stock (about 3.1% of the issued and outstanding stock) for substantially all of the assets and business as a going concern of Clorox Chemical. Clorox Chemical was dissolved and the Procter stock received by it was distributed among Clorox Chemical's stockholders.

Record support: Complaint and Answer, Par. 9; CX 702, p. 10.

1. *The acquisition was initiated by Clorox Chemical and the price paid was fair.*

22. The negotiations leading up to the agreement of May 28, 1957, were initiated by Hellman of J. Barth & Company, investment brokers acting on behalf of Clorox Chemical, and not by Procter.

[Note: With those principally interested as stockholders in Clorox Chemical reaching or nearing the age of retirement (CX 28, page 3; also see Finding 90 *infra*), it was natural for them, in their own interest and that of their estates, to dispose of their stock holdings for easily marketable securities (Feigenbaum, Tr. 1178-79; CX 28, page 14; see also, Secs. 358 and 368 of the Internal Revenue Code). The Hearing Examiner will take judicial notice that such a sale to other than a large company, is difficult, if not impossible, and that in the absence of such an opportunity, stockholders in smaller companies will be prejudiced and deprived of an opportunity to realize the full value of a business which through their

Proposed Findings of Fact

efforts over a period of years has grown and prospered.]

Record support: Feigenbaum, Tr. 1208-10; 1172-75.

23. There is no proof nor is there any claim that the price paid for the assets of Clorox Chemical was arrived at other than through arms-length negotiation, or represented other than a fair price for the purchase of a company of the size, earning power and repute of Clorox Chemical. Indeed there is affirmative evidence demonstrating that the price was fair.¹

[Note: The above proposed Finding is amply supported by the record. Respondent, during the examination of its witness Hellman, proposed to demonstrate affirmatively that the price paid by Procter was a fair price (Tr. 4833). Before interrogating the witness, the following colloquy appears in the record:

"MR. ROYALL: If they will stipulate or agree that the price we paid with Procter and Gamble stock, which they say is worth \$30,300,000, was a fair value for the assets of the Clorox Chemical Company, we will have no question.

"HEARING EXAMINER HAYCRAFT: I don't know that they have to say that. But I would like to know wherein they can make such contention that you talk about. There is no contention here that you paid too much for the stock. [Tr. 4827-28.]

"HEARING EXAMINER HAYCRAFT: What is your contention? What are you going to argue to me? Are you going to say that Procter and Gamble allowed more than they should have for that goodwill?

Record support: ¹ CX 28, page 13. For example, Clorox Chemical dividends at the time the exchange ratio was determined were 85% of Procter dividends, or exactly the ratio of the stock exchange.

Proposed Findings of Fact

"MR. TINCHER: I am going to say that the goodwill and trademark was worth the difference between \$30.3 million and the value of the assets.

"HEARING EXAMINER HAYCRAFT: That is your contention?

"MR. TINCHER: Yes, sir. That doesn't say they paid more than they should have or less than they should have.

"HEARING EXAMINER HAYCRAFT: As I get it, you are saying that it was neither way?

"MR. TINCHER: That is right. I don't think it is material or relevant.

"HEARING EXAMINER HAYCRAFT: On that basis, Mr. Royall, if he is not going to make the contention that you paid too much for the business of Clorox, why should we worry about it?

"MR. ROYALL: Your Honor, there must be some trick in it. They wouldn't—

"HEARING EXAMINER HAYCRAFT: I have myself on record here. I have asked the question and I will tell you now that based on the evidence that is in the record, and what he just now said, I am not going to allow any such argument. I am not going to make a finding of that kind." (Tr. 4829-30.)

Later in the proceedings complainant introduced the annual statement of Procter for the year ending June 30, 1958, and adverted to the increase in the Procter "Goodwill, Patents and Licenses" account. (Tr. 5954) Any such increase is immaterial. Even if there were proof that such increase was attributable to the purchase of Clorox Chemical, it was merely a book entry and would have resulted from normal treatment of the difference between the selling price and the net value of the physical assets on Clorox Chemical's books of record.]

Proposed Findings of Fact

24. There is no proof that Procter was not justified in believing that the price paid for Clorox Chemical represented a sound investment in view of the proved earning power of that company. Likewise, there is no proof that Procter acquired Clorox Chemical for the purpose or with the intent of lessening competition or eliminating competitors or creating a monopoly.

[Note: The Hearing Examiner indicated at Tr. 1210-11 some of the factors pertinent to the motives of Procter in acquiring Clorox Chemical which might be relevant in establishing the complainant's contentions. There was, however, no proof by complainant of any such factor or of any other improper consideration applicable to the purpose of, or motive for, the acquisition.]

Record support: CX 28, pp. 12-13.

C. NO "HORIZONTAL" OR "VERTICAL" MERGER ASPECTS ARE INVOLVED IN THE ACQUISITION.

25. Prior to the acquisition Procter did not compete in the household liquid bleach market and none of its products was competitive with household liquid bleach.

Record support: Complaint and Answer, Par. 11.

26. There is no proof nor is there any claim that prior to the acquisition Procter sold any products to manufacturers engaged in the production of household liquid bleach or that Procter was a customer for any products of any manufacturer engaged in the production of household liquid bleach.

III. The Structure of the Bleach Industry

A. THE LINE OF COMMERCE

27. Complainant has claimed that household liquid bleach (as distinguished from the entire household bleach market,

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both liquid and dry) is the line of commerce against which the effects of the acquisition should be measured. Complainant has, however, failed to submit any proof establishing that household liquid bleach alone constitutes the relevant market. Some companies (but not Clorox) which produce liquid bleach also produce dry bleach.

[Note: Purex manufacturers and distributes a dry bleach under the brand name Beads O'Bleach. CX 439 and 440; RX 114.]

Record support: Complaint, Par. 15; Morgens, Tr. 481-83; Brower, Tr. 2691.

28. Dry bleach represents a substantial part of the total household bleach market (approximately 10%).¹ Complainant has offered no proof as to the competitive effects of dry bleach upon the sales of liquid bleach; as to the length of time during which dry bleach achieved 10% of the total bleach market; or as to whether the sales of dry bleach are expanding; or as to the significance of dry bleach, in the future, as a competitive factor in the overall bleach industry.

Record support: Morgens, Tr. 482.

29. Household liquid bleach is, however, a different line of commerce from soap, detergents and scouring cleansers.

Record support: Complaint and Answer, Par. 11.

B. THE SECTION OF THE COUNTRY (Regional or National Market)

30. Paragraph 8 of the complaint alleges a national market in household liquid bleach. The alleged market shares which complainant attributes to various producers of household liquid bleach sold through grocery stores are

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percentages of an assumed national market. The complaint includes no allegations concerning one or more regional markets and no relief is requested as to any such markets.

31. There is no proof of a national market in the household liquid bleach industry. All the evidence, including that introduced by complainant, shows that there are a series of regional or local markets, the geographical confines of none of which have been shown with any exactitude.¹ Every bleach producer (except Clorox) called as a witness by complainant testified in effect that the household liquid bleach market was a regional, non-national market.² The weight of household liquid bleach packed for shipment results in high freight costs relative to the value of the product and necessarily restricts the region served by any one production facility. As a result, the liquid bleach industry consists of many bleach producers. In the main each producer markets its products in the regions in which it has manufacturing facilities and which it considers can be economically served by such facilities.³ In consequence, differing competitive factors and conditions are to be found in each relevant regional market.³

Record support: ¹ Stoneman, Tr. 1543-4; Hahn, Tr. 2172; Trimpe, Tr. 1320; Brower, Tr. 2712.

² Stoneman, Tr. 1523; Prescott, Tr. 2578, Brower, Tr. 2712; Gardiner, Tr. 2858; Jones, Tr. 2927-28; Riccardi, Tr. 3020; Mendleson, Tr. 3150; Giachetti, Tr. 2147; Kunin, Tr. 2349; Smooke, Tr. 1756-57.

³ Trimpe, Tr. 1363.

32. Clorox is the only bleach producer which sells household liquid bleach throughout the United States.¹

Purex, Ltd., the second largest liquid bleach producer, marketed its brand of bleach in areas of the United States

Record support: ¹ Stoneman, Tr. 1543-44; Hahn, Tr. 2172.

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containing 48% of the population, at the time of the acquisition of Clorox Chemical by Procter.² Since Purex's acquisition of Fleecy White, it now markets liquid bleach in areas of the United States containing 64% of the population.³ All of the other members of the industry sell only in smaller regional or local areas.

Market shares based on national percentages are therefore meaningless as a measure of effective, realistic competition existing in various regional markets.

Record support: ² Stoneman, Tr. 1524-25.

³ Stoneman, Tr. 5712-13.

33. In various regional or local markets where competition is vigorous and effective, a bleach manufacturer whose market share would be small on a national basis has a large and sometimes major share in his particular region or area of operation. For example, Linco whose operations are confined to the area in and about Chicago has about 45-50% of the liquid bleach market in that area.¹ Purex in the 7 western states (comprising the Pacific territory as reported in the Nielsen Food Index) has the largest share of the market.² Hilex, which is distributed in the Minneapolis territory is stronger than Clorox.³

[Note: In subsequent proposed findings we will deal in greater detail with the competitive factors and shares in various regional markets, as well as the nature of the operations of the various competitors therein. The foregoing examples are set forth to indicate that market shares unrelated to regional situations are in no wise reflective of actual competitive conditions. See comments of Hearing Examiner, Tr. 4431-32.]

Record support: ¹ Hahn, Tr. 2181.

² RX 87 and CX 681.

³ Bellingall, Tr. 5180.

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34. Complainant has the burden of proof in establishing the relevant market or markets or sections of the country in which the claimed lessening of competition might probably result. It has failed to show that a national market is the proper one against which the effects of the acquisition should be measured. It has also failed to show that there is any particular regional market in which any restraint or lessening of competition would probably result by reason of the acquisition. There is thus a failure of proof as to the extent or nature of the relevant market or markets in which it is claimed that any lessening of competition or tendency to monopoly might probably occur.

IV. The Acquisition Has Not Had and There Is No Proof That It Probably Will Have Any Effect Upon the Manufacture of Liquid Bleach, or Will Result in Any Lessening of Competition or Tendency To Monopoly in Respect of Such Manufacture

A. THERE ARE NO PATENTS CONTROLLING THE MANUFACTURE OF LIQUID BLEACH.

35. Neither Clorox nor Procter has any patents controlling or applicable to the manufacture of liquid bleach and there is no evidence that there are any patents in the field limiting in any way the manufacture of liquid bleach by anyone.

[Note: There was testimony to the effect that Clorox Chemical had a patent, or had applied for a patent, relating to the use of liquid bleach on nylon and rayon fabrics. The acquisition has not affected this one way or the other. The evidence showed that this so-called patent simply represented a development emanating from research conducted by Clorox Chemical related to a new use for Clorox. The nature of the new use was that Clorox bleach, when used with ordinary household vinegar, would remove the yel-

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lowish cast that developed in all nylon and rayon fabrics after a period of exposure to air. It is clear that this so-called "use" patent had nothing to do with the manufacture of liquid bleach, nor could it restrict the use of vinegar with any other liquid bleach to accomplish the same purpose. Tr. 4250-51; 4266; 5033-34; 5187-89.]

Record support: Montgomery, Tr. 3936.

B. THE MANUFACTURING PROCESS IS RELATIVELY SIMPLE.

36. The manufacture of household liquid bleach is not highly technical but is a relatively simple process.¹ The process consists of introducing chlorine into a caustic soda solution, the resulting chemical reaction being one which forms sodium hypochlorite. By controlling the proportions of the basic ingredients, the sodium hypochlorite content of the solution is fixed as 5¼%, which is the strength of substantially all of the household liquid bleaches marketed, including Clorox. After the chemical reaction is terminated, as determined by chemical analysis, the solution is then permitted to settle so as to eliminate any impurities and is then bottled. The processing of the sodium hypochlorite solution is done in plastic or rubber-lined steel or iron containers.²

Record support: ¹ Stoneman, Tr. 1540; M. Giachetti, Tr. 2145-46; Brower, Tr. 2711; Montgomery, Tr. 3933.
² Montgomery, Tr. 3930-32, 3937, 3985-86.

37. Information relating to methods and processes for the manufacture of liquid bleach, and improvements thereof, is published by large chemical companies which are engaged in the manufacture of the raw materials required, and is readily available to all who are in the industry or interested in entry,

Record support: RX 53, 54, 56; Montgomery, Tr. 3947-48, 3949-54.

*Proposed Findings of Fact***C. THE COST OF THE PLANT AND EQUIPMENT REQUIRED TO MANUFACTURE OR PRODUCE LIQUID BLEACH CONSTITUTES NO BARRIER TO ENTRY INTO THE BUSINESS.**

38. There is no evidence that any specially designed type of building is required for the manufacture of household liquid bleach. There is evidence that Clorox is manufactured in plants which are warehouse types of buildings, each consisting of a small office, a processing portion, a bottling portion in which there is the bottling line, and warehousing space for the produced stock.¹ There is evidence that equipment required for the production of sodium hypochlorite solution is readily available at reasonable costs² and there is no evidence that the machinery and equipment required for a plant of any given capacity is not readily procurable.

The complainant, which has the burden of proof as to any claims of difficulties in entry to the market, has offered no direct evidence as to the cost of a plant and equipment for the production of household liquid bleach in substantial commercial quantity. Various witnesses testified concerning this in general terms, but the complainant did not offer the records of any bleach manufacturer as to the actual capital investment which it had in its plant. Of the various witnesses who testified, Stoneman of the Purex Company stated that the capital investment for a liquid bleach plant would not be great.³ Giachetti of the Linco Company stated that the machinery involved is not "expensive; it is costly", and estimated that the equipment in the Linco plant was worth about \$250,000.⁴ Jones testified that the equipment was expensive and estimated that

Record support: ¹ Montgomery, Tr. 3956-57.

² M. Giachetti, Tr. 2146.

³ Stoneman, Tr. 1565.

⁴ M. Giachetti, Tr. 2146.

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the equipment in his plant would cost about \$50,000.* Based upon the foregoing inconclusive testimony, it must be found that the cost of a plant for the manufacture of household liquid bleach on a scale comparable to that of the bleach companies from whom testimony was offered by complainant would be substantial but in no wise prohibitive.

[Note: We urge that the complainant in this case as in all other Section 7 cases, has the burden of establishing that entry into the market in the manufacturing sense is difficult if any such point is to be urged in support of the complaint. With respect to plant and equipment cost, complainant, if so minded, and if it intended to rely upon this point, could readily have introduced through the representatives of competitive bleach manufacturers the actual cost of the various plants of these manufacturers. Except for the few general statements as to equipment cost, referred to above, it wholly failed to make any showing in this respect. In this state of the record we submit that no burden rested upon respondent affirmatively to produce such evidence.

It should be noted, however, that respondent proffered, through its witness Montgomery, evidence to the effect that the cost of a plant and equipment having a capacity of 250,000 cases of liquid bleach per year would be \$120,000, including the purchase of land and the construction of a building; and that if the building were leased the cost of a plant of such size would be about \$60,000; and that a plant having a capacity of 400,000 cases per year would cost approximately \$5,000 more. (Tr. 3963-64)].

Record support: * Jones, Tr. 2943-44.

39. In addition to the household liquid bleach manufacturers who have plants for the production of sodium hypochlorite solution, the complainant introduced testimony

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from two household liquid bleach companies selected by complainant showing that in order to enter into the liquid bleach industry on a successful commercial scale a plant for the manufacture of sodium hypochlorite solution is not essential. These companies procure concentrated sodium hypochlorite from chemical concerns which is delivered to their plants in tank cars and then produce their household liquid bleach by the simple process of diluting concentrated solution and bottling it for resale as household liquid bleach.

Record support: Brower, Tr. 2659-60; Buchman, Tr. 2786; Montgomery, Tr. 3934.

Mr. Stoneman defined a bleach manufacturer as one "who bottled liquid hypochloride [sic] under his own brand and sold it through grocery stores." (Tr. 5654)

40. Those companies which produce household liquid bleach by diluting concentrated sodium hypochlorite are in competition with those which produce such liquid bleach by introducing chlorine into a caustic soda solution.

Record support: Brower, Tr. 2689-90; Buchman, Tr. 2782.

D. RAW MATERIALS AND BOTTLES ARE READILY AVAILABLE, AND NO ADVANTAGES HAVE ACCRUED TO CLOROX IN PURCHASING THEM.

41. There is no shortage of materials required for the manufacture of liquid bleach. They are readily available in all parts of the country and are produced by many of the larger chemical companies, including Hooker Chemical, Dow Chemical, Stauffer Chemical, Frontier Chemical, Diamond Alkali, Wyandotte, Solvay, Olin-Mathieson, Columbia Southern, Westvaco and Pennsylvania Salt Company.

Record support: Montgomery, Tr. 3946-47; RX 53, 54 and 56.

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42. There is no proof nor is there any claim that Clorox Chemical had or Clorox has any exclusive contracts with respect to raw materials from which household liquid bleach is made; or that Clorox has secured or can secure any price advantage in purchasing such raw materials by reason of the acquisition; or that Clorox will enjoy any advantage over competitors in purchasing raw materials or other supplies utilized in the manufacture of household liquid bleach.

43. Except for the new patented Purex bottle,¹ there is no proof that the bottles required for the bottling of liquid bleach are not readily available to any and all producers of household liquid bleach, and there is no proof that Clorox Chemical had or Clorox has any exclusive contracts for bottles.

Record support: ¹RX 114, pp. 7 and 14.

44. There is no proof that by virtue of the acquisition Clorox, if it were to purchase, jointly with Procter, the bottles used in the bottling of its liquid bleach, could obtain any advantages over competitors that were not enjoyed by Clorox Chemical.

[Note: The only testimony concerning purchases of bottles was given by the witness Mendleson, who testified that the number of bottles purchased for Vano liquid bleach was very small, whereas the number of bottles bought for liquid starch was substantial; and that his company was able to get a low price by combining the purchases of the two types of bottles (Tr. 3159-60). This, however, in no way conflicts with the above proposed finding since there is no proof that Clorox Chemical prior to the acquisition was not receiving the maximum quantity discounts procurable or that combining such purchases with those made by Procter would increase such discounts in any respect.]

*Proposed Findings of Fact***E. THERE IS NO PROOF THAT THE ACQUISITION WILL RESULT IN ANY ADVANTAGES IN PRODUCT OR PACKAGING RESEARCH.**

45. Procter has certain product research facilities which, within the limitations of such facilities, could be utilized for research related to any of the products which it manufactures.¹ None of these facilities have been used by Clorox for liquid bleach research,² and there is no proof that any of such facilities are adaptable for product research in the liquid bleach field, or that, if adaptable, it would be advantageous or desirable to use them.

Record support: ¹ Morgens, Tr. 644.
² Montgomery, Tr. 3979.

46. Independent agencies are available to and are used by bleach companies in product and packaging research and development. For example, Clorox had research done for it by Stanford Research Institute;¹ Purex utilized the services of Latchford Marble Glass Co., one of its glass suppliers, in working out a new bottle design;² Gardiner hired others to do its research or used the facilities of one of its chemical suppliers;³ and Prescott hired an independent organization to design its new Dazzle bleach label.⁴

Record support: ¹ Matson, Tr. 1157-58; Montgomery, Tr. 3978.
² Stoneman, Tr. 1903.
³ Gardiner, Tr. 2878.
⁴ Prescott, Tr. 2614-16.

47. There is no proof that the use by Clorox of any product or packaging research facilities within the Procter organization will result in any advantages, financial or otherwise, which were not available to Clorox Chemical within its own organization or from independent agencies.

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F. THE MANUFACTURING MACHINERY AND EQUIPMENT USED BY PROCTER COULD NOT BE USED IN THE MANUFACTURE OF HOUSEHOLD LIQUID BLEACH AND THERE IS NO PROOF THAT ANY ADVANTAGES WOULD RESULT FROM ANY JOINT USE OF SUCH FACILITIES.

48. The machinery and equipment used in the manufacture of soaps and detergents is not interchangeable with the machinery and equipment used in the manufacture of liquid bleach, nor can it be used in such manufacture, because in the manufacture of bleach the tanks and parts of the filling lines must be protected with plastic or rubber.¹ There is conflicting testimony as to whether equipment used for the bottling of synthetic detergents could be used in the bottling of liquid bleach. Respondent's witness Montgomery testified that it could not be so used because of the types of material and construction necessary for and the difference in the types of filling.² Complainant's witness Stoneman testified that all elements in the *packaging* line for liquid detergents are usable for liquid bleach except the filler and it would require some corrosive-proof parts.³ The complainant has not sustained its burden of proof as to any claim of interchangeability, but, in any event, it is not necessary to resolve this particular conflict in the testimony in view of the fact that there is no showing that the matter is of any significance in this proceeding.

[Note: The witness Stoneman testified that the equipment for "manufacturing and packaging" liquid detergents is similar to that used for liquid bleach. It is clear, however, from his testimony that he was referring only to the packaging or bottling equipment and not to any equipment used in manufacturing (Tr. 5628-30).

Record support: ¹ Montgomery, Tr. 3957-58.

² Montgomery, Tr. 4004.

³ Stoneman, Tr. 5628-30.

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Moreover, when an unused portion of Procter's plant in Kansas City was utilized for the manufacture of Clorox, it was necessary to use the Clorox manufacturing equipment and machinery (Tr. 1069-1071).]

49. There is no proof that any of Procter's plants is located at a point where Clorox could beneficially use any additional manufacturing facilities, even if Procter's facilities were interchangeable, for the manufacture or bottling of liquid bleach. Likewise there is no proof that Clorox needs or requires or could profitably use any additional manufacturing capacity in any area in which any Procter plant is located.

[Note: The change in plant location in Kansas City came about because there was a vacant building on the Procter manufacturing site and it was deemed desirable to utilize it. (Tr. 489-90; 1045-47). There was no proof that this change was made because of any inadequacy of the Clorox plant or that any substantial advantages or economies in manufacture resulted.]

50. In addition to the factors considered in the foregoing findings, there is no proof that Clorox Chemical (or Clorox) could use any additional financial resources in connection with or in the development of its manufacturing operations or facilities, or that the availability of any additional financial resources by reason of the acquisition would provide any advantages not theretofore possessed by Clorox Chemical.

G. THERE ARE MANY COMPANIES ENGAGED IN THE MANUFACTURE OF LIQUID BLEACH FOR SALE UNDER THEIR OWN BRANDS AND UNDER THE PRIVATE LABELS OF GROCERY CHAINS.

51. Evidence introduced by the parties as to the number and size of firms engaged in the manufacture of household

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liquid bleach is inconclusive for the purpose of establishing the exact number and size of such firms. Evidence offered by the respondent showed that there were approximately 225 such firms.¹ Complainant introduced evidence showing that only 139 of these 225 firms were listed in Dun & Bradstreet.² Complainant, which has the burden of proof, failed to establish that the total number of firms in the industry was substantially different from that shown by respondent and in any event complainant recognizes that there were 139 such firms of sufficient financial stature to be listed in Dun & Bradstreet. In sum, the evidence requires the Finding that there are a large number of firms engaged in the manufacture and distribution of household liquid bleach of varying financial size and importance. The evidence shows that all of these competing firms, except Clorox, are engaged in the liquid bleach business only in particular regions of the country. Complainant has offered no proof as to the significance, size or importance, of the business done by most of these firms in the particular regions in which they do business.

[Note: Morgens testified that there were over 100 and maybe 200 bleach companies making household liquid bleach (Tr. 477). Stoneman said that there were 35 to 50 liquid bleach producers in the entire United States (Tr. 1543)].

Record support: ¹ RX 112.

² CX 696 A-P. In introducing this exhibit, the Government witness said that he did not know the size of the companies not included in Dun & Bradstreet and that they could be smaller or larger than those included (Tr. 5943).

52. In every region of the country in which testimony was taken in this proceeding, the evidence showed that there were several competitors of Clorox, at least one of

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which was of substantial size and which had substantial sales of liquid bleach in such region, and in certain of such regions the sales of such competing firms exceeded those of Clorox.

Record support: CX 443; RX 114; CX 464; CX 472; CX 473; CX 483; CX 491; CX 496; CX 503; CX 504; CX 510; CX 519A. Also see Finding No. 33.

53. In addition to the bleach companies specifically identified, there are a large but indeterminate number of small bleach manufacturing companies, many of whom sell their product from trucks door-to-door.¹ The sales of these door-to-door bleachers are significant in some parts of the country. For example, in Cleveland, Ohio, a survey shows that in 1958 they were selling over 38% of the household bleach sold in the Cleveland area.² Since the end use of the bleach sold by these door-to-door bleachers and that sold through retail stores is the same, namely, household bleaching and disinfecting, they are competitive with each other.

Record support: ¹ Hahn, Tr. 2257; Brower, Tr. 2702; Gardiner, Tr. 2870; Bennett, Tr. 4481, 4534-35.
² RX 63 and 64.

54. Complainant has offered no evidence as to the volume of household liquid bleach sold by these door-to-door bleachers in most of the various regions of the country. Such sales are not taken into account in the Nielsen Food Index¹ in the reporting of market shares.²

Record support: ¹ Hereinafter referred to as "Nielsen."
² Nickelson, Tr. 4685.

55. Household liquid bleach is also sold through laundromats and such sales are a new and expanding develop-

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ment in the market.¹ Sales through laundromats are not taken into account by Nielsen.²

Record support: ¹ Trimpe, Tr. 4428.
² Nickelson, Tr. 4685.

56. In addition to liquid bleach sold under the brand names of the manufacturing bleach companies, there is a large volume of household liquid bleach sold under the private brand names of retail grocery organizations. One of these private brands is both manufactured and sold by a large retail organization (Safeway Stores) and the others are manufactured by bleach companies and sold to the grocery organizations for resale under the latter's private labels. RX 68 is a collection of two hundred of such private label bleaches which are currently being manufactured and sold. There is no proof that RX 68 includes all or substantially all such private labels.

[Note: The Hearing Examiner, we think, can take judicial notice of the fact that many of these retail grocery chains have greater resources than Procter.]

Record support: Stoneman, Tr. 1547; RX 68 and 69 A-Z.

57. The volume of liquid bleach produced by established bleach manufacturers and sold under the private label of the country's largest grocery chain (A & P) is very substantial, is steadily increasing and approximates the sales of Clorox in the stores of such chain.

[Note: CX 684 shows that comparing the first six months of the years 1956, 1957 and 1958, there was a steady and substantial increase in the sales of A & P's private label bleach, Bright Sail. Likewise, a comparison of the sales of the last six months of

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1956 with the last six months of 1957 shows a corresponding increase.]

Record support: RX 78; CX 684.

58. At least seven of the competing bleach producers called as witnesses for complainant produce private label bleach in addition to selling bleach under their own brand names.¹ Certain of the larger competitors of Clorox produce a large number of private labels, such as Purex—34 private labels, Prescott—41 private labels, Hood—7 private labels.² Another large competitor, Roman Cleanser, very recently began producing private label bleach.³ For some of these competitors, the value of sales of private label bleach are a substantial part of their total sales of liquid bleach. For example, Linco Distributing Corporation,⁴ Hood Chemical Co.⁵ and J. L. Prescott Company.⁶

Record support: ¹ Stoneman, Tr. 1521-22; Smooke, Tr. 1755; M. Giachetti, Tr. 2117; CX 464; MacDonald, Tr. 2335, 2379; Henkel, Tr. 2552; CX 491; Riccardi, Tr. 3045. Also see Brower, Tr. 2724; Jones, Tr. 2972.

² CX 688 A-B.

³ Riccardi, Tr. 3045.

⁴ CX 464 (In camera).

⁵ CX 472 (In camera).

⁶ CX 491 (In camera).

59. Clorox Chemical did not and Clorox does not manufacture household liquid bleach for sale under any private label.

Record support: Brown, Tr. 1072-73; Trimpe, Tr. 4934.

60. All sales of private label liquid bleach (except Safeway) represent sales by manufacturing competitors of Clorox and have the same competitive effect as if the liquid bleach had been marketed under the brand name of the respective manufacturing bleachers.

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61. Sales of private label bleach by liquid bleach producers competing with Clorox are not categorized separately and are not included in the figures which show Nielsen Food Index market shares for such producers' own brands, and to the extent of such sales, the Nielsen figures understate the sales and the total share of market of each such producer.

Record support: Nickelson, Tr. 4712-13.

62. Such evidence as there is on the subject shows that the manufacture and sales of private label bleaches have grown since 1955 and that a greater number of grocery chains now carry private brands than was the case in 1955.

[Note: The complainant has made no effort to present any evidence respecting the importance or significance of private label liquid bleach either by showing the volume of private label business done by competing bleach producers or volume and entry into the business at the grocery store level. In addition to certain statistics introduced by respondent respecting A & P and Colonial Stores, substantially all of the evidence on the subject was elicited from respondent's witnesses. The testimony relating to this subject was to the following effect:

Respondent's witness Trimpe testified that private labels are a "very significant development" (Tr. 4247); that private label bleaches have increased considerably since he came with Clorox Chemical in 1955 (Tr. 4276, 4396); and that the increase generally has been concentrated in certain areas but that there has also been an increase nationally (Tr. 1279). He also testified that the large Winn-Dixie chain had introduced a private label bleach in the Miami and Tampa markets in the early part of 1958 (Tr. 5556).

Bellingall testified that there had been a growth in private label activity after 1955 (Tr. 5267), and fur-

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ther testified that there had been additional growth of private label bleaches throughout the country after the acquisition (Tr. 5074).

A bleach producer, called as a witness by complainant, testified that private label brands were his principal competition (Rinaldi, Tr. 2518).

Complainant's witness Stoneman testified that Purex manufactured a private label bleach for the 25 stores of the Von grocery chain in Los Angeles, which entered the market in 1958 (Tr. 5733). The Purex Annual Report for 1956 states that "The trend towards private label or controlled brands by large chains, particularly on items of large volume and fast turnover, continues to rise." (CX 439, p. 12.)

Bissmeyer of Colonial Stores testified that in 1956 the Colonial chain sold 65,784 quarts of its private label bleach; 76,392 quarts in 1957 and 179,748 quarts in 1958 up to the time of his testimony (Tr. 4839).

Respondent's witness Bennett stated that the private label bleach "Speed-Up" came into the Buffalo market in early 1958 (Tr. 4484). In this apparently Mr. Bennett was mistaken as to the year since it appears that this private label had been introduced in 1954 and 1955 and continued into 1958.

The testimony concerning this growth of private label bleach was virtually uncontradicted.

Complainant introduced as CX 645 a summary of responses received by Clorox from its distributors concerning the number and sales trend of private label bleaches in the territory of each distributor. As indicated on the exhibit, some distributors reported that particular private label bleaches were having no real competitive effect but that in other instances they were growing and represented a substantial part of the market. There is nothing in Exhibit 645 which contradicts the testimony of respondent's witnesses. Respondent made no claim that in every section of the country or with respect to every private label bleach there had been an increase in competition. As was

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stated by Trimpe, the increase in the number of private label bleaches generally has been concentrated in certain areas; however, they have also increased nationally (Tr. 1279). Respondent's sole claim was that private label bleach in certain chains and in certain sections of the country was expanding and constituted a highly competitive factor in such markets.]

63. The growth of private label liquid bleaches is attributable, in part at least, to the fact that generally such bleaches can and do undersell such brands as Clorox and Purex and other "quality" bleaches;¹ that the grocery chains having such private label liquid bleaches can and do favor their own brands with special preference as to shelf location and quantity of shelf space, and give them favorable promotional backing in their store.²

The competition of private label bleaches is a growing competitive factor³ in the liquid bleach market, and constitutes an expanding sector of competition for Clorox and all other producer brands.³

Record support: ¹ Stoneman, Tr. 1545-46; M. Giachetti, Tr. 2120-21; Kunin, Tr. 2412; Bissmeyer, Tr. 4847.

² Bellingall, Tr. 5191; Trimpe, Tr. 5556-59.

³ See Finding No. 62.

1. *The manufacturing facilities and sales areas of certain competing firms have been expanded subsequent (as well as shortly prior) to the acquisition and there is no proof that the acquisition may deter further expansion.*

64. There is no proof that the total number of manufacturers and producers of household liquid bleach has decreased since 1955, or since the acquisition, nor is there any proof that, aside from certain shifts in ownership (hereinafter specified), any company of appreciable size has withdrawn from the manufacture of household liquid bleach since the acquisition.

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[Note: Complainant's witness Mendleson testified that B. T. Babbitt, Inc. acquired Chemicals, Inc. in August of 1956; that this latter company manufactured a number of products, including a liquid bleach "Vano" (Tr. 3185), which, as shown by CX 530, had been steadily declining in sales which were relatively insubstantial. The witness further testified that his company had decided in August, 1956, a year prior to the acquisition, not to promote or advertise the liquid bleach "Vano" (Tr. 3185). Indeed, an indication of the insubstantial nature of the Vano bleach business is the fact that in the annual Babbitt report for 1956 no mention was made of the fact that a liquid bleach had been acquired, although the other products acquired in the purchase of Chemicals, Inc., were fully discussed. The witness further testified that in accordance with a decision which his company had made in 1953, at a time when Babbitt was not engaged in the bleach business, not to compete with the soap companies, his company discontinued the manufacture of liquid bleach in the first part of 1958.

While, of course, complainant will undoubtedly argue that this is an instance of a withdrawal resulting from the acquisition, we submit that it can not fairly be cited as such. As all of the testimony and the Examiner's probing questions reveal, the Babbitt Company had determined a year prior to the acquisition not to promote or actively to compete in the sale of this particular brand of bleach. Furthermore, it shows that the decision to discontinue the manufacture of this liquid bleach was a part of a policy determined upon in 1953 and which came into automatic operation with the acquisition (Tr. 3185-92).]

65. Shortly before and since the acquisition certain companies in the liquid bleach business have expanded their operations by building new plants or acquiring new plant sites, to wit:

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The John Puhl Products Company, manufacturer of Fleecy-White bleach, constructed a new plant in Alliance, Ohio.¹

The Purex Company has acquired a plant at Bristol, Pennsylvania, at which it intends to manufacture liquid bleach.²

Roman Cleanser has acquired 16 acres of land for use in the manufacture of liquid bleach at Lawrenceburg, Indiana, near Cincinnati.³ Roman Cleanser, in March or April, 1958, acquired a plant for the manufacture of liquid bleach in Miami, Florida.⁴

* [Note: Respondent proffered evidence to the effect that if permitted to answer the pertinent questions the witness Trimpe would testify that the Hilex Company had recently constructed a new plant in Milwaukee, Wisconsin (Tr. 4302-11).]

Record support: ¹ Trimpe, Tr. 4297.

² RX 114, p. 21 (Compare with CX 438, p. 22); Stoneman, Tr. 5734.

³ Riccardi, Tr. 3063.

⁴ Riccardi, Tr. 3062-63.

66. Shortly prior, as well as subsequent, to the acquisition certain companies in the liquid bleach business acquired plants from other existing manufacturers and thus expanded their sales area and business, as follows:

In October, 1958, the Purex Company acquired all of the plants and business of the John Puhl Products Company, a subsidiary of Sterling Drug Company and the manufacturer of Fleecy-White Bleach, and Purex thereby increased its sales area and volume of business.¹

Prior to this acquisition by Purex the Hilex Company had sold its plant in Dallas, Texas, to the Sterling Drug Company (John Puhl Products Company).²

Record support: ¹ Stoneman, Tr. 5630-35, 5712-13; CX 561.

² Stoneman, Tr. 1544.

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The Barton Chemical Company sold a plant in Grissith [sic], Georgia, adjacent to Atlanta, to the company manufacturing Roman Cleanser, and the sales area and volume of business of that company was thus expanded.^{*}

Record support: ^{*} Stoneman, Tr. 1544.

67. Since the acquisition certain companies engaged in the manufacture and sale of household liquid bleach have expanded their sales areas and have entered into competition with Clorox in such areas, as follows:

Fleecy-White bleach (John Puhl Products) expanded into central and eastern Ohio, and is expanding throughout the state very rapidly.¹ Also this brand entered Arkansas and Louisiana and is spreading rapidly.² Also this brand is now being distributed in Virginia.³

The Texize Company entered the central section of Tennessee during the year 1958.⁴

The Sani-Clor Company has entered Nevada.⁵

By its acquisition of Fleecy-White (heretofore referred to) in October, 1958 Purex increased its sales area geographically so as to cover 64% of the total population of the United States.⁶

Purex expanded its sales into Erie, Pennsylvania.⁷

[Note: Respecting the expansion of sales territories, complainant's witness Gardiner testified that at some time subsequent to 1952 he tried to expand into Syracuse but pulled out because of losses. These losses

Record support: ¹ Trimpe, Tr. 4380-81.
² Trimpe, Tr. 4381.
³ Trimpe, Tr. 4380, 4913-14, 5431-32.
⁴ Trimpe, Tr. 4381.
⁵ Trimpe, Tr. 4382.
⁶ Stoneman, Tr. 5630, 5635, 5712-13.
⁷ Stoneman, Tr. 1575; CX 450.

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he attributed to the fact that his Syracuse broker was not very good and also that trucking and warehousing made it too expensive to break into an established territory (Tr. 2878). This testimony, we submit, simply reflects the acknowledged facts that effective salesmanship is important and that transportation costs have a significant effect upon the radius within which household liquid bleach can be distributed from a particular plant. In any event, it in no wise indicates that this experience of Mr. Gardiner was the result of any anti-competitive activities of Clorox Chemical or Clorox, before or after the acquisition.]

68. There is no claim or proof that any of the acquisitions or expansions referred to in preceding Findings 65, 66 and 67 were in any way caused by the acquisition or resulted in any way from the acquisition or that they would not have occurred had there been no acquisition. Nor is there any proof that any shifting of ownership or disposition of facilities by any company was occasioned by, or resulted because of, the acquisition. Rather, the acquisitions and expansions referred to in such preceding Findings reflect the confidence of competitors as to their future in the household liquid bleach business and disprove any fears that their ability to compete has been adversely affected by the acquisition.

69. There is no proof that any bleach company producing household liquid bleach has been prevented from expanding its plants or its sales area by any activities or exclusionary practices of Clorox Chemical or Clorox.

70. There is no proof that any company producing household liquid bleach has been prevented or deterred from expanding its plants and sales area by the acquisition of Clorox Chemical by Procter.

*Proposed Findings of Fact***V. The Acquisition Has Not Had and There Is No Proof That It Probably Will Have Any Effect Upon the Distribution of Liquid Bleach****A. THERE IS NO PROOF THAT THE ACQUISITION COULD OR MIGHT PROBABLY RESULT IN ANY ADVANTAGES IN THE DISTRIBUTION OF CLOROX LIQUID BLEACH OR THAT ANY CHANGE IN THE METHOD OF DISTRIBUTION IS PROBABLE.**

71. Most household liquid bleach is sold to the consumer through grocery stores.

[Note: As indicated in preceding Findings 53 and 55, a certain amount of household liquid bleach is sold through door-to-door distributors and laundromats. It is also sold in department stores and to some extent in drug stores and variety stores, although such sales are not in great quantity. (Morgens, Tr. 426-A) In this Section we treat with the evidence relating to distribution by the producer to the grocery outlets.]

Record support: Stoneman, Tr. 1547; S. Giachetti, Tr. 2074-75; Kunin, Tr. 2371; Olkin, Tr. 2461; Prescott, Tr. 2583; Brower, Tr. 2698; Buchman, Tr. 2791; Gardiner, Tr. 2857-58; Riccardi, Tr. 3046.

72. Certain producers of household liquid bleach, including Clorox, distribute the liquid bleach produced by them to wholesale and retail outlets through distributors or brokers.¹ Others sell directly to retailers and wholesalers through their own direct salesmen.² Other manufacturers utilize a combination of these methods of distribution.³

Record support: ¹ Gardiner, Tr. 2859, 2894; (Fleecy-White) Leazar, Tr. 4110; Stoneman, Tr. 5638; RX 77B.

² Stoneman, Tr. 1547; S. Giachetti, Tr. 2069; Riccardi, Tr. 2513; Brower, Tr. 2683, 2703; Buchman, Tr. 2777-78.

³ Stoneman, Tr. 1561-63, 5734-35; Smooke, Tr. 1756; Kunin, Tr. 2348; Olkin, Tr. 2462; Prescott, Tr. 2567-68; Riccardi, Tr. 3095.

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73. Clorox has always been distributed through distributors or brokers.¹ This method of distribution was successful and had proved effective for the Clorox brand.²

[Note: Complainant brought out through its witness Chaddock that there was no change at all in the relationship between the distributor and Clorox following the acquisition (Tr. 1218).]

Record support: ¹ Morgens, Tr. 501-2.

² Morgens, Tr. 888; Trimpe, Tr. 4363-65.

74. The evidence is conflicting as to which method of distribution is the more economical and the more effective. Such conflict need not be resolved since the issue is collateral and immaterial.

[Note: There was testimony that the Purex Company had changed its method of distribution from brokers to direct salesmen in or about 1956 and that this was advantageous in reducing sales costs and in giving more control over the sales effort (Tr. 1561-65). When, however, Mr. Stoneman testified in January, 1959 he indicated that at least in one instance (i.e., Portland, Oregon) Purex had reverted to using a broker (Tr. 5734).

When respondent offered evidence to establish that there was no showing that Purex's change to direct selling had resulted in any improvement in its market share the Hearing Examiner expressly ruled that he would make no finding as to which method of distribution was the better, based on the Purex experience, holding that this matter was not an issue in the case but was a "collateral by-pass" (Tr. 4729-31).

In view of this ruling, we are submitting no further findings as to this point. We do point, however, to the testimony in the record that in the distribution of household liquid bleach, brokers or distributors are preferable because, among other things, they have

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a continuing standing and prestige in their respective territories (Tr. 4363-65), and perform services in the store area which are not usually performed by direct salesmen (Tr. 4356-57; see also Tr. 4447). In so far as grocery stores, as purchasers of liquid bleach, are concerned, it makes no difference whether the merchandise is sold by distributors or by direct salesmen (Tr. 4031).]

75. There is no evidence that a change from distributors to direct salesmen in the distribution of Clorox would be beneficial or more effective or result in any economies. Procter has no plan or intention to change the successful Clorox distributor organization¹ and there is no evidence indicating that any change from distributors to direct salesmen is probable or would be advantageous to Procter or Clorox in any way.

[Note: Mr. Morgens, the President of Procter, last testified in January, 1959, seventeen months after the acquisition. At that time he had had an additional eleven months, since the time of his testimony in February, 1958, to observe and evaluate the effectiveness of Clorox's distribution through brokers. In his last testimony, he stated that at that time Procter was more than ever sold on the Clorox distributing system because of its effectiveness; and that Procter had no plans and knew of no reason why it would be changed in the foreseeable future (Tr. 5516-18). This testimony was subsequently stricken on motion of complainant. We submit that if the complainant proposes to make any point that a change in the distribution method is significant or is likely to happen, then Mr. Morgens' testimony was clearly competent to refute any such claim and should be considered by the Examiner. Indeed, we know of no more effective

Record support: ¹ Morgens, Tr. 888.

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refutation than that offered by the President of Procter as to his satisfaction with the present distribution system, his intention to retain the same, and his lack of any reason for changing it.]

76. There is no proof that a conversion by Clorox to direct selling, either through its own salesmen or through Procter salesmen, would have any adverse effect on competition in the household liquid bleach industry, or would result in any lessening of competition.

B. THE ACQUISITION WILL HAVE NO EFFECT UPON TRANSPORTATION COSTS.

77. In the distribution of household liquid bleach freight costs are a substantial proportion of the total cost of the product.¹ Such costs limit the radius of the area which can be economically served by any particular plant manufacturing household liquid bleach. The testimony of all witnesses on the subject was that such economic radius was no more than 400 miles from the plant.² Several stated that it would be 300 miles.³ Others testified that it was between 200 and 250 miles.⁴ Two witnesses stated that it was 150 miles.⁵

Record support: ¹ Morgens, Tr. 496; Stoneman, Tr. 1572; CX 437.

² Prescott, Tr. 2578

³ Stoneman, Tr. 1523; Jones, Tr. 2927-28.

⁴ M. Giachetti, Tr. 2147; Kuhn, Tr. 2349; Mendleson, Tr. 3150.

⁵ Gardiner, Tr. 2858; Riccardi, Tr. 3020.

78. Large freight costs are an advantage to the local and regional bleach producer since they protect and shelter such producer within his limited area of operation from competition from plants located in other areas.

Record support: Brower, Tr. 2712.

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79. There is no proof that any freight savings have been or can be secured by Clorox by reason of the acquisition, either through any combination of shipments with Procter products or otherwise. The evidence shows that the per case freight cost of Clorox in the seven month period following the acquisition was higher than in the twelve month period ending June 30, 1957.¹

[Note: The witness Stoneman testified that the shipment of a number of products from a common source of manufacture results in lower transportation costs (Tr. 1875-9). This has no application to the freight costs of Clorox since it manufactures no product other than Clorox in any of its plants and (with the exception of shipments from the Kansas City plant) could not combine any of its shipments with Procter products. As to the Kansas City plant there is no evidence and no basis for any claim that any combined shipments would be made or that, if made, any substantial freight savings would result therefrom.

Furthermore, on the whole record there is no proof that Clorox Chemical, prior to the acquisition was not securing the lowest possible freight or trucking rates.]

Record support: ¹ CX 437.

VI. The Acquisition Has Not Had and There Is No Proof That It Probably Will Have Any Effect Upon the Marketing of Clorox Liquid Bleach

A. THERE IS NO PROOF NOR IS THERE ANY CLAIM THAT PRICES OR PRICING POLICIES WILL BE AFFECTED BY THE ACQUISITION.

80. Historically Clorox bleach has been sold to Clorox distributors throughout the United States at uniform¹

Record support: ¹ Brown, Tr. 1050-51.

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prices which have been as high or slightly higher than most other competing brands.

[Note: The Clorox uniform national price affords and has afforded certain competitive advantages to regional and local bleach producers who have more flexibility in adjusting their prices to the particular demands of their competitive area.]

81. Before the acquisition, Clorox's public acceptance, and the premium price thereby obtainable, had been due in part, to the following factors:

- (1) Independent laboratory tests of Clorox, as compared with other bleaches, demonstrated the superiority of Clorox.¹
- (2) Clorox's claim of antiseptic property higher than any other bleach had been advertised for a number of years and there is no proof that such claim was ever successfully questioned or contradicted.²
- (3) Clorox Chemical at all times maintained a high degree of care in the manufacture, control and inspection of its product in order to make certain that the product was uniform.³

The public acceptance of Clorox bleach has continued after the acquisition, but there is no proof that the acquisition increased such acceptance. Nor is there proof that any of the foregoing contributing factors has been or probably will be affected by the acquisition.

[Note: The testimony in support of the foregoing finding was uncontradicted. However, a number of competing bleach manufacturers testified to the effect that they knew of no chemical or functional differences between Clorox and other competing bleaches

Record support: ¹ Matson, Tr. 1157-58.
² Montgomery, Tr. 3938-40.
³ Montgomery, Tr. 3985-86, 3992, 4007.

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(Tr. 2143, 2262-63, 2517, 2689, 2873). None of these witnesses were, however, chemists and the Hearing Examiner commented that it would be necessary for a chemist to prove whether or not all liquid bleaches were chemically the same (Tr. 2364).]

82. There is no proof that any superior qualities possessed by Clorox over competing liquid bleaches could not be duplicated by others, assuming equal care and effort.

83. Certain other bleach manufacturers who distribute high quality liquid bleaches sell at substantially the same premium price as Clorox. Among such manufacturers are Purex,¹ Linco,² Prescott,³ 101,⁴ Roman Cleanser,⁵ and Hilex.⁶

Liquid bleaches manufactured by certain other regional manufacturers sell at a price slightly less than Clorox.⁷

Private label bleaches customarily sell for less than Clorox or other premium quality bleaches.⁸

In addition to the foregoing general pricing situation, there is evidence that in particular regional situations certain competitive bleaches have been sold at a higher price than Clorox.⁹

[Note: Bellingall stated that Clorox is a quality product with prestige and earns a premium price (Tr. 5302).]

Record support: ¹ Stoneman, Tr. 1545-46.

² Compare CX 465 and CX 399A.

³ Compare CX 492 and CX 399A.

⁴ Gardiner, Tr. 2867-68.

⁵ Riccardi, Tr. 3051.

⁶ RX 85, Table 11, page 18 (designated by respondent in document handed to complainant on January 27, 1959, Tr. 5626).

⁷ Smooke, Tr. 1761; compare CX 477, CX 486, CX 502, CX 508, CX 515 and CX 531 with CX 399A; Rinaldi, Tr. 2515.

⁸ Stoneman, Tr. 1545-46; M. Giachetti, Tr. 2120-21, Kunin, Tr. 2412.

⁹ Gardiner, Tr. 2867-68; Riccardi, Tr. 3051; Bellingall, Tr. 4376, 5302-3; RX 85, Table 11, page 18.

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84. In November 1957, following the acquisition, Clorox raised its prices on the half gallon and gallon sizes because of increased costs.¹ Both Clorox Chemical and Clorox in setting the prices for their product have taken into account increases in the cost of manufacture and distribution, as well as competitive prices.²

Competing bleach manufacturers have likewise taken increased costs and competitive prices into account in increasing prices.³

Since any increased costs are general in the industry the price increases of competing bleaches have generally paralleled Clorox's increase in price.

Record support: ¹ Trimpe, Tr. 1317; CX 399 A-B.
² Trimpe, Tr. 1317.
³ M. Giachetti, Tr. 2148-49; Hahn, Tr. 2270.

85. While certain of complainant's witnesses testified that their prices tended to follow Clorox, there is no evidence that Clorox could establish or maintain any premium price not related to costs and not in line with competitive prices.

86. Following the November, 1957 price increase, the retail price of Clorox went up in some sections of the country and did not in others, depending upon the local competitive situation.¹

[Note: Although Clorox suggests a selling price to its distributors, the distributor is in no way bound and there is no agreement that he must sell at any particular price (Morgens, Tr. 887).]

Record support: ¹ Trimpe, Tr. 1319.

87. Such evidence as there is on the subject shows that Clorox could not maintain a price increase, even though

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directly related to costs, which resulted in a substantial differential between the price of Clorox and the price of competing bleaches. When Clorox raised its price in Atlanta and in Buffalo to reflect the higher cost of a new bottle, the adverse effect on sales caused it to lower its price to the prior level.¹

[Note: The testimony relating to the loss of sales and the discontinuance of the price increase of ten cents per case in Atlanta is pointedly supported by RX 129, being a contemporaneous memorandum, dated June 20, 1958, from Mr. Trimpe to Mr. Brown. The memorandum sets forth the figures showing the loss in sales following the introduction of the new bottle with a handle at the higher price. It reflects a loss of sales in each of the months in question compared with the same period of the preceding year.

In addition, the memorandum refers to the fact that a further consideration for discontinuing the quart bottle at the premium price is that a "grave distribution problem" was faced in the area due to the "dual price arrangements" on quarts.]

Record support: ¹ Morgens, Tr. 3313; Trimpe, Tr. 4373-74; RX 129 A-B.

88. There is no proof that Clorox Chemical or Clorox has ever initiated or engaged in any predatory pricing practices or policies. There is no proof that the acquisition of Clorox Chemical by Procter will have any effect on pricing practices or policies in the bleach industry nor is there any proof from which it can be inferred that there is any reasonable probability that such a result would occur.

[Note: We think it self evident that the foregoing is required by all of the evidence. Certainly there is

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nothing in the past history of Clorox Chemical or Procter proving or tending to establish any disposition or proclivity to engage in any program of "price cutting" for the purpose of eliminating a competitor. Such coupons or price-off labels as have been temporarily used in local markets have been for defensive purposes to meet increased competitive activities, and have been used by other bleach manufacturers both before and after the acquisition. Indeed Clorox's whole history demonstrates that its success has been achieved by the constant maintenance of a relatively high price level for its product. There is nothing remotely suggesting that under Procter's ownership the situation will be changed in any respect. (Tr. 5092-95).]

89. Neither Clorox Chemical nor Clorox nor Procter has fixed or controlled or sought to fix or control the resale price of Clorox bleach charged to consumers by grocery or other retail outlets,¹ nor is there any proof that there is any reasonable probability that Clorox or Procter could fix or control such resale prices or would attempt to do so.

Record support: ¹ Morgens, Tr. 887.

B. THERE IS NO PROOF THAT ANY CHANGES IN THE MANAGEMENT OF CLOROX WILL PROBABLY RESULT IN ANY ADVANTAGES IN THE MARKETING OF CLOROX LIQUID BLEACH OR ANY LESSENING OF COMPETITION.

90. As a result of the acquisition, none of the operating personnel of Clorox Chemical has been changed. At or about the time of the acquisition, however, several of Clorox Chemical's key personnel retired because of age or health.

For example, William J. Roth, former President, retired because of illness and age, although he still acts in a con-

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sulting capacity;¹ W. L. Wolford, former Executive Vice President, had reached retirement age and retired at or about the time of the acquisition;² Larry Barton, Vice President of Technical Research, reached retirement age and retired in 1956.³

Record support: ¹ Morgens, Tr. 840A; Brown, Tr. 1044.
² Brown, Tr. 1044.
³ Trimpe, Tr. 4226.

91. Since the acquisition, these retired personnel have been replaced and additional personnel have been added, some in the sales organization in accordance with a program begun by Mr. Trimpe in 1955.¹ For example, at the time of the acquisition, Fred Brown, former Procter manager of technical staff divisions, became Executive Vice President of Clorox;² Richard Oster came from Procter as a marketing staff associate; Rex Fink came as a manufacturing staff associate, and Richard Melrose as a laboratory technician.³ Subsequently, W. B. Young, transferred to Clorox from Procter,⁴ and Edward Melnick, formerly employed by Quaker Oats, became new Division Sales Managers.⁵

Record support: ¹ Trimpe, Tr. 1277.
² Brown, Tr. 1029-30.
³ Brown, Tr. 1036-37.
⁴ Brown, Tr. 1037; Trimpe, Tr. 1275-76.
⁵ Trimpe, Tr. 1277.

92. The business of Clorox is conducted under the direction of Fred Brown though the officers of Clorox who fulfill the same functions as they did under Clorox Chemical management. Mr. Brown reports directly to Howard Morgens.

Record support: Morgens, Tr. 840A-B; Brown, Tr. 1029.

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93. There is no proof nor is there any claim that the Procter personnel transferred to Clorox have any superior or potentially superior ability over the retired Clorox Chemical personnel. Nor is there any proof that Procter or any other company has any monopoly on competent and experienced personnel or that equally competent and experienced personnel are not available to other competing bleach companies.

94. The success of Clorox prior to the acquisition, as alleged in the complaint and as evidenced by the record, shows the competence and ability of the Clorox Chemical management prior to the acquisition.¹ There is no proof that the acquisition will result in any substantial change.

[Note: Mr. Morgens' testimony, which was subsequently stricken, stated that there "is no way that I can see that anyone can conclude that Procter & Gamble could have done better with the Clorox brand than the old Clorox management did." (Tr. 5513). He further stated that in looking at the growth record and other indicia of success, one must conclude that Clorox was a remarkably successful business and that you cannot get that success without very competent management. (Tr. 5513). We submit that this testimony was competent. We also point out that our references to the stricken testimony of Mr. Morgens is in line with the special ruling of the Hearing Examiner (Tr. 5614) that such testimony and certain other testimony of Mr. Bellingall could properly be referred to in the submission of these Proposed Findings.]

Record support: ¹ Complaint and Answer, Par. 8.

- C. THERE IS NO PROOF THAT THE ACQUISITION WILL PROBABLY RESULT IN ANY ADVANTAGES IN MARKET RESEARCH OR IN THE OBTAINING OF MARKET INFORMATION.

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95. Clorox distributors, both before and after the acquisition, rendered periodic reports, giving full and complete information regarding market conditions, sales trends and competitive activity within their territories. These reports were used by Clorox Chemical and continue to be used by Clorox in the formulation of sales policies and decisions.¹

Such reports, both before and after the acquisition were made in the same manner, with the same regularity and through the same channels, although the form of the reports differed slightly after the acquisition.²

Record support: ¹ Trimpe, Tr. 4352-54, Tr. 4366; RX 76 A-D.

² Trimpe, Tr. 4207, Tr. 4349, Tr. 4354; RX 76 A-D; Bennett, Tr. 4447.

96. In addition to market information received from its distributors, Clorox Chemical and Clorox had and has available information from their advertising agency as to merchandising activity at the store level and advertising and promotional activity in the field.¹

Furthermore, Clorox Chemical and Clorox also had and has secured the Nielsen Food Index, showing market shares of household liquid bleach sold through grocery stores. Such Nielsen information as was and is received by Clorox Chemical and Clorox was and is available to anyone who subscribes therefor.²

Record support: ¹ Bellingall, Tr. 5013.

² Morgens, Tr. 763; Trimpe, Tr. 1332; Stoneman, Tr. 1797; CX 27; CX 325, CX 334, CX 335, RX 85.

97. Surveys conducted by newspapers are available in many areas of the country which show market shares of brands in the particular areas served by such newspapers. These surveys provide the regional or local bleach producer with data as to market share, are inexpensive and

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are more directly pertinent to regional or local competitive conditions than national surveys, such as Nielsen Food Index.

Record support: Trimpe, Tr. 1314-16; Smooke, Tr. 1765-66; Hahn, Tr. 2185; Olkin, Tr. 2484-86; Tr. 2491-94; Brower, Tr. 2705-6; Riccardi, Tr. 3045; Royer, Tr. 4114-15; RX 63, RX 64, RK 65.

98. There is no proof that as a result of the acquisition, Clorox has secured any advantages in obtaining market information or intelligence which were not possessed by Clorox Chemical.

99. In addition to providing information regarding marketing conditions in the field, the Clorox advertising agency had and has available, for use by its clients if desirable, market research facilities for determining consumer preferences and reactions.¹

Record support: ¹ Bellingall, Tr. 5013.

100. Market research facilities are available to anyone who desires or has some use for such services through independent market research organizations.¹

Record support: ¹ Morgens, Tr. 696-7; Stoneman, Tr. 1545, 1644-46.

101. Procter maintains a separate market research department within its organization for certain types of market research surveys. Procter finds it advisable, as well, to utilize independent agencies.¹

Record support: ¹ Morgens, Tr. 693, 696-7, 775.

102. There is no proof that market research, as distinguished from market information, is necessary or desirable for Clorox or any other company in the liquid bleach industry, and there is no proof that, even if market research

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information were necessary or desirable, that any advantages, financial or otherwise, would accrue to Clorox as a result of any use which might be made of Procter's market research department.

D. THE ACQUISITION HAS NOT HAD AND THERE IS NO PROOF THAT IT PROBABLY WILL HAVE THE EFFECT OF LESSENING COMPETITION OR TENDING TO MONOPOLY BY REASON OF ANY ADVANTAGES RESULTING THEREFROM IN THE ADVERTISING OR PROMOTION OF CLOROX LIQUID BLEACH.

1. All forms of consumer goods advertising and promotion are and have been known and used in the liquid bleach industry.

103. There are many ways and methods to advertise and promote in the household liquid bleach industry as in other consumer foods industries. Such varied methods, including among others the following, have been used in the liquid bleach industry.

TV Spots,¹ Network or Local TV programs,² Radio Spots,³ Radio Programs,⁴ Magazines,⁵ Newspapers,⁶ Trade

Record support: ¹ Smooke, Tr. 1767; Stoneman, Tr. 1776, CX 455; S. Giachetti, Tr. 2077, 2079-80; Olkin, Tr. 2448; Prescott, Tr. 2568; Gardiner, Tr. 2862; Riccardi, Tr. 3022; Clorox, CX 407.

² Stoneman, Tr. 1776; M. Giachetti, Tr. 2237; Jones, Tr. 2988.

³ Smooke, Tr. 1767; Stoneman, Tr. 1776; S. Giachetti, Tr. 2077; Hahn, Tr. 2169; Kunin, Tr. 2352; Olkin, Tr. 2448, 2466; Prescott, Tr. 2568; Gardiner, Tr. 2859-60, 2862, 2876-77; Riccardi, Tr. 3022; Clorox, CX 406.

⁴ Smooke, Tr. 1767; Prescott, Tr. 2610-11; Buchman, Tr. 2939-40; Jones, Tr. 2988.

⁵ Stoneman, Tr. 1776; CX 455; Kunin, Tr. 2352; Clorox, CX 404 and 405.

⁶ Stoneman, Tr. 1776; Hahn, Tr. 2169; M. Giachetti, Tr. 2236; Olkin, Tr. 2448; Prescott, Tr. 2568; Buchman, Tr. 2780; Gardiner, Tr. 2859, 2862; Jones, Tr. 2918; Riccardi, Tr. 3021-22; Bellingall, Tr. 5121.

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Papers,⁷ Bus signs, road signs and billboards,⁸ Couponing,⁹ Limited Sampling,¹⁰ Premiums,¹¹ Spring and Fall House-cleaning Promotions,¹² Reduced Price Labels,¹³ Contests,¹⁴ Banners,¹⁵ In-Store Broadcasting,¹⁶ In-Store Promotions,¹⁷ Two for the Price of One,¹⁸ Free Goods to Dealers,¹⁹ Premiums or Prizes to Dealers,²⁰ Count and Recount,²¹ Reduced Prices to Dealers,²² Cooperative Advertising.²³

In addition, many of the bleach producers offer special services to the retailers.²⁴

[Note: Although the evidence shows that the methods of advertising and promotion of household liquid

Record support: ⁷ Olkin, Tr. 2448; Gardiner, Tr. 2898-2900.

⁸ Riccardi, Tr. 3021, 3048, 3076-77.

⁹ Stoneman, Tr. 1579, 1581-82; CX 455; Hahn, Tr. 2170; Gardiner, Tr. 2863; Jones, Tr. 2976-78, 2988-89, 2992; Riccardi, Tr. 3023.

¹⁰ Shaver, Tr. 1417-18; Stoneman, Tr. 1904.

¹¹ Trimpe, Tr. 1327-28; Stoneman, Tr. 1586-87; M. Giachetti, Tr. 2136; Hahn, Tr. 2170; Prescott, Tr. 2624-25; Jones, Tr. 2979, 2993; Riccardi, Tr. 3031; Mendelson, Tr. 3168.

¹² Hahn, Tr. 2170; Riccardi, Tr. 3050; Bellingall, Tr. 5034-36.

¹³ Shaver, Tr. 1414; Stoneman, Tr. 1527; M. Giachetti, Tr. 2149-50; Kunin, Tr. 2354-55; Olkin, Tr. 2449; Riccardi, Tr. 3030.

¹⁴ Stoneman, Tr. 1692.

¹⁵ Buchman, Tr. 2795-96; Gardiner, Tr. 2877; Jones, Tr. 2983; Riccardi, Tr. 3048-49.

¹⁶ Buchman, Tr. 2814-19; Gardiner, Tr. 2860-61; Jones, Tr. 2959-61.

¹⁷ Trimpe, Tr. 1301-2; Purex, CX 455; Kunin, Tr. 2360-61; Prescott, Tr. 2572-4; Brower, Tr. 2686-7.

¹⁸ Glorox, CX 418.

¹⁹ Smooke, Tr. 1762; Hahn, Tr. 2259, 2262; Kunin, Tr. 2353; Rinaldi, Tr. 2513; Prescott, Tr. 2624; Brower, Tr. 2684; Buchman, Tr. 2781; Gardiner, 2863, 2895-96; Jones, Tr. 2981-82; Riccardi, Tr. 3024, 3078-80.

²⁰ Stoneman, Tr. 1569-71; S. Giachetti, Tr. 2081; Olkin, Tr. 2483-84; Riccardi, Tr. 3086.

²¹ Prescott, Tr. 2569-71; Gardiner, Tr. 2877-78.

²² Riccardi, Tr. 3028-29; Mendleson, Tr. 3168.

²³ Morgens, Tr. 679; Stoneman, Tr. 1577; S. Giachetti, Tr. 2086-87; MacDonald, Tr. 2396-2400; Buchman, Tr. 2779-80; Riccardi, Tr. 3022-23; Mendleson, Tr. 3168.

²⁴ S. Giachetti, Tr. 2081; Brower, Tr. 2690; Buchman, Tr. 2790.

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bleach may differ from those appropriate to other consumer household products (See Finding 111), yet as to all such products, changes in method will always be made when changed conditions so require. This is evident from the many varied advertising and promotional methods which have been used by bleach producers and is specifically demonstrated by the activities of Purex, in the new promotions of its patented bottle and the advertising in connection therewith (CX 455).]

104. With respect to these differing methods, there is no unanimity of opinion, even among the complainant's witnesses, as to which is the most effective.

[Note: Smooke of Lady's Choice Foods testified that within his company there had been argument for years as to whether the radio or TV is the most effective media. (Tr. 1767).

Testimony from the Linco Company witness was to the effect that TV was most effective. (Tr. 2078) Kunin of the Hood Chemical Co. said that there was no answer to the question as to which is the most effective way to sell liquid bleach. (Tr. 235F-52.)

Buchman of the Savol Chemical Co. testified that cooperative advertising was the most effective way to sell household liquid bleach. (Tr. 2781)

Olkin of Rose-Lux Chemical Co. said that it was hard to see which was the most effective type of advertising. He thought that TV was if he could afford to pay for prime time. (Tr. 2448-49)

Stoneman of Purex testified that the television programs used to advertise Purex liquid bleach had run their course and that other forms of advertising had been substituted for them (Tr. 1902-3).]

105. It is necessary that the use of particular ways and methods of advertising and promotion be varied from

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time to time, since a single form of advertising or promotion becomes stale and loses its appeal to the consumer.

[Note: Trimpe stated that techniques must be changed to meet the circumstances of the times. Both Clorox Chemical and new Clorox have been changing their techniques. (Tr. 1367-69)]

Kunin of Hood testified that his company tests television at one time, newspapers at another and radio at another. (Tr. 2351-52).

Purex used coupons with the introduction of its new bottle in Erie but did not do so in Evansville. (Tr. 1062)

Bennett testified that "every manufacturer changes his plans from time to time. Any given set of ads or any given promotion will get stale in time and those have to be constantly changed, seeking new ideas, new applications to the problem." (Tr. 4476-77)].

106. There is no proof that any of the types and methods of advertising and promotion used by Procter and other manufacturers in the consumer goods industries was not known to and used by one or more producers in the household liquid bleach industry.

[Note: In addition, certain advertising and promotional methods are better suited and more particularly adapted to regional and local manufacturers than to a national manufacturer. For example, Roman Cleanser sponsors a bowling team (CX 522) and Gardiner shared in the maintenance of a booth at a county fair (Tr. 2962-63). In addition, regional and local producers have the ability to take advantage of unexpected advertising and promotional opportunities requiring immediate action (Tr. 4480).]

107. There is no proof that there are any specialized or unique services in the field of advertising and promo-

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tion available through the Procter organization which are not equally and as inexpensively available from independent private sources. For example, prior to the acquisition, Clorox Chemical (as does Clorox) had available to it, through its advertising agency, media and marketing data and information, specialists in television, radio, copy, art and so forth.¹

Record support: ¹ Bellingall, Tr. 5011-14.

a) The significance of advertising and promotion.

108. Advertising and promotion, regardless of the amount, can have no lasting beneficial effect on an inferior product.

[Note: Morgens: "Quality is the primary requirement. You can't sell anything without quality, no matter how well you advertise . . . you can sell it once, but you can't get the housewife to come back to purchase it." (Tr. 505-6).]

Leazar testified that "Quality and such business as that" is the "fundamental starting point" in obtaining consumer acceptance and that the consumer is not going to buy a product that isn't any good. (Tr. 4080).

Bissmeyer testified that if the quality isn't satisfactory, the consumer won't buy it at any price. (Tr. 4857-58).]

109. Wherever there is appreciable competition, advertising and promotion will not materially or profitably increase the sales of an established brand with as high a share of market as Clorox, although to cease advertising and promotion would produce a loss.

[Note: Morgens: "Any brand with a high share of market is very vulnerable. We don't know of any

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brand that's been able to retain as high a share of market, our own included, over any period of time, when someone wants that business, is willing to enter a new field, or—when someone wants to enter and hold the bleach business, it is inevitable that we will lose some share . . . it would be very unprofitable for us to spend the kind of money that is necessary to retain that kind of share." (Tr. 822-3).

Bellingall testified concerning any objective to increase the Clorox share, "We have our hopes in this direction, but the expectancy is not too great when you have a brand position as Clorox has. It is difficult to increase share against aggressive competition." (Tr. 5063) [sic, but see Tr. 5257].

In testimony subsequently stricken, Morgens stated that even if Procter & Gamble had greater power and were willing to use it, it would not be a practical thing to do because the cost of getting any additional share of market would be much greater than would be justified by any additional volume that might be secured. (Tr. 5515-16).]

110. In the case of established products, such as Clorox liquid bleach, promotions may result in temporary gains in market share which, following the promotion, recede to their former level.¹

[Note: In the only instance (Erie, Pa.) in which complainant sought to relate the effect of a Clorox promotion to market share, the evidence shows that despite increases in market share during the promo-

Record support: ¹ Chaddock, a Clorox distributor, stated that promotions have a momentary and not a lasting effect on market share (Tr. 1232).

Olkin of Rose-Lux testified that the cents-off label promotion gave a "shot in the arm" (Tr. 2449).

Hahn of Linco testified that promotions temporarily increase market share and that gains are not always maintained but the market position is generally solidified (Tr. 2190).

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tional period the Clorox share after the promotion returned to its former level (CX 450). No surveys similar to CX 450 were introduced by complainant for other areas in which Purex introduced its new bottle although such surveys, at least for Evansville, were made and subpoenaed by complainant (Tr. 1577) but not offered. Also, Mr. Stoneman was requested to bring those surveys with him when he testified in Washington but did not do so (Tr. 5724-26). It is reasonable to presume that if such surveys had been supplied, they would have been adverse to the complainant and would have shown that the Purex market share was unaffected by the Clorox counter-promotion.

Also RX 88 introduced by the respondent as the best evidence obtainable by it shows during the period of the Clorox promotions in Erie, Pa., the Clorox share of market, according to a Nielsen audit of one medium independent store, decreased every bi-monthly reporting period.]

2. Advertising or promotional techniques or expenditures in one industry are no criteria for another.

111. There is no proof that the advertising and promotional techniques or expenditures employed in one industry, such as the soap, detergent and cleanser industry, are equally applicable to another industry, such as the household liquid bleach industry, in which the number and size of competitors, the type of product and the frequency of use of such techniques differ.

[Note: Mr. Stoneman testified at Record 1696 that: "Yes, there is a higher frequency of use in promotion devices in package soaps, detergents and toilet soaps than there is in the bleach industry."

Mr. Stoneman also testified that free samples or coupons are rarely broadly used in the bleach in-

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dustry; that cents-off labels are too expensive to use over a wide geographical area; and that the advertising cost in relation to net sales is lower than in the soap and detergent business (Tr. 1692-93).

Hearing Examiner: "... there would be definite differences [in the soap and detergent as compared to the bleach industry], depending upon the size and character of your competitors in the different industries. In other words, where you have, as there is in Clorox transactions, an industry in which Clorox is the largest and practically the only national distributor and the others are smaller, you have an entirely different situation, competitive-wise that Procter & Gamble will have to contend with than you have in an industry where you have a half dozen active, strong competitors ..." (Tr. 3764).]

112. There is no proof as to what amount of expenditure for advertising and promotion of a household liquid bleach would be comparable to amounts expended for advertising and promotion of soaps, detergents or cleansers.

113. There is no proof that there is any probability that the same or similar amounts of money expended by a manufacturer on the advertising and promotion of new products such as Comet, Gleem and Crest would be expended in the advertising and promotion of a long established product.

[Note: Hearing Examiner: "When Procter & Gamble goes into any industry or field, market, to sell its products, it is met with varying competitive conditions, and we can't assume that Procter & Gamble would necessarily have to spend the same amount of money, or any given amount of money, in order to sell Crest, for instance, or some other item, in another industry, other than the bleach industry ..." (Tr. 540, 3646-47).]

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3. *The acquisition has resulted in no change in the media used in the advertising of Clorox liquid bleach, and any change of emphasis in the use of media is not attributable to the acquisition.*

114. Prior to the acquisition Clorox Chemical made extensive use of various advertising media in the marketing of Clorox liquid bleach. This policy has continued after the acquisition and for both Clorox Chemical and Clorox the major portion of their expenditures for advertising and promotion since at least 1953 was for the purchase of advertising media.

Record support: RX 83.

115. Clorox Chemical began using TV spots in July, 1956 and the use of this type media has been continued by Clorox.¹

[Note: While Clorox continued to spend increasing sums for TV spots after the acquisition, this was but the extension and effectuation of the policy established by Clorox Chemical prior to the acquisition (Morgens, Tr. 3394)].

Record support: ¹ CX 407-A-C.

116. Clorox Chemical began using radio spots in the last part of 1956 and continued to use them after the acquisition in the Southeastern United States region only. Neither Clorox Chemical nor Clorox has used radio programs.

Record support: Bellinall, Tr. 5070-77; 5241-43; 5261; CX 406.

117. Clorox Chemical did not use, nor does Clorox use, network TV.¹ TV Spots for Clorox are preferable to net-

Record support: ¹ Morgens, Tr. 574, 579; Shaver, Tr. 1421; Trimpe, Tr. 4946-47.

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work TV because the flexibility of spot TV permits adjustment of the advertising weight given the brand depending upon the brand's volume of business in any particular area,² which volume varies greatly in the case of Clorox. There is also evidence that this also applies to radio.³

Record support: ² Bellingall, Tr. 5102, 5316-17. The Hearing Examiner said that he would almost take judicial notice of this fact. Tr. 5318-19.
³ Kunin, Tr. 2352.

118. In the opinion of the Clorox advertising account executive, 60 second TV spots are preferable to 20 second TV spots for the advertising of Clorox, because they are a better vehicle for the brand's advertising message.¹ Initially it was difficult to obtain the desired 60 second spots and the schedule since 1956 has been gradually modified to replace 20 second with 60 second spots as the latter became available. 60 second and 20 second TV spots cost the same on most stations.²

Record support: ¹ Bellingall, Tr. 5304, 5097.
² Bellingall, Tr. 5096-5101, 5304-10. The Hearing Examiner said that he would take judicial notice of the fact that 20 second and 60 second spots usually cost the same (Tr. 5312).

119. There is no proof of any probability that there will be any joint sponsorship of television or radio programs by Clorox and other Procter brands. Moreover, there is no proof that any advantages would accrue by reason of any such sponsorship, or that joint sponsorship is not available and equally effective when engaged in by unrelated companies. In many cases Procter brands co-sponsor programs with brands of other manufacturers.¹

[Note: For example, Prescott participated with others in the Morgan-Baker show (Tr. 2610-11).]

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Linco sponsors five minutes of the 15-minute Dorsey-Conners TV show (Tr. 2240-41).]

Record support: ¹ Snow, Tr. 3466; CX 575.

120. Prior to the acquisition Clorox Chemical advertised extensively in magazines. There has been a substantial reduction in spending by Clorox for magazine advertising since the acquisition, as well as a reduction in the number of magazines in which Clorox is advertised.¹ There is no proof that the reduction in total expenditures for magazine advertising was a result of or affected in any way by the acquisition.

Record support: ¹ Morgens, Tr. 3401; Shaver, Tr. 1445-46; CX 402, CX 403, CX 404A-B, CX 405A-E; RX 83.

121. Prior to the acquisition Clorox Chemical advertised extensively in newspapers. Such advertising has continued since the acquisition¹ and there is no proof that there has been any change in policy or practices.

[Note: The complainant, with the introduction of CX 546, attempted to show an increase in the newspaper lineage of Clorox in 1958 as compared to 1957 (Tr. 3493). That exhibit was seriously in error and was subsequently stricken upon a showing that the periods used were not comparable (Tr. 5387). Complainant indicated that a new exhibit would be prepared for rebuttal but none was submitted (Tr. 5386). In any event, a variation in newspaper advertising in different periods and for different purposes is not and has not been shown to be of any significance (Tr. 5383).]

Record support: ¹ Morgens, Tr. 578; RX 83.

122. It is normal and customary advertising practice and procedure to change, from time to time, the emphasis

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given any particular medium, or to change from one medium to another.¹ Thus the fact that there may have been changes in the relative use, by Clorox, of various media after the acquisition, is no proof that such changes were occasioned by or resulted from the acquisition.

[Note: The Hearing Examiner expressed this view at Tr. 5976-77.]

Record support: ¹ MacDonald, Tr. 2331-32; M. Giachetti, Tr. 2236.

4. *Certain relatively small rate discounts are available to Clorox as a result of quantity purchases of certain media but these are of no significance in the overall advertising of Clorox liquid bleach and could result in no lessening of competition.*

123. Discounts are generally available to an advertiser dependent upon the total quantity purchased by the advertiser in any one type of media from any one source. The amount of the discounts which may be realized appear on the published price schedules.

Record support: Morgens, Tr. 572; Stoneman, Tr. 1776-82.

124. Advertisers, in general, including Procter and Clorox, buy media which best suit their needs and the type and placement of advertising are not determined by the discounts, if any, to be realized.¹

Record support: ¹ Morgens, Tr. 577; Shaver, Tr. 1401; Snow, Tr. 3422-23.

125. The maximum estimated savings to Clorox resulting from the joint buying by Procter and Clorox of television advertising is only \$86,000 per year, and of radio advertising is \$500 per year.¹

Record support: ¹ Shaver, Tr. 1463; Morgens, Tr. 3234.

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Such savings are *de minimis* in terms of Clorox's annual net sales.²

Record support: ² CX 12 (annual sales for year ending June 30, 1957 of \$39,999,114.11).

126. The maximum estimated savings to Clorox in the purchase of magazine advertising is only \$50,000.¹ Such savings are *de minimis* in terms of Clorox's annual net sales.²

Record support: ¹ Shaver, Tr. 1463; Morgens, Tr. 3234.
² CX 12.

127. The maximum estimated savings to Clorox in the purchase of newspaper advertising is infinitesimal (\$2,000) whether measured in total dollars or in relation to a dollar of sales.¹

Record support: ¹ Shaver, Tr. 1397-98, 1455, 1458; Morgens, Tr. 3234; CX 12.

128. There is no proof and no inference can be drawn that such savings would materially affect the quantity or effectiveness of the advertising, or that such savings would have any substantial effect upon the operations of Clorox.¹

Nor can any inference be drawn that such discounts, however small, represent competitive advantages over other bleach producers, since local manufacturers in numerous instances can obtain TV spots at a lower rate than a national advertiser such as Clorox or Procter² and local advertisers can obtain local rates for newspaper advertisements which are not available to a national advertiser.³

Record support: ¹ See also Finding 155 in which it is noted that advertising costs have increased substantially, thus further minimizing any small discounts.

² Bellingall, Tr. 5077, 5277-79.

³ Morgens, Tr. 675-8.

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In any event any savings in advertising costs would have significance only if it were shown that Clorox was unable to finance advertising activities without such savings. There is no such proof here.

5. *No change in the type or extent of promotional activities has resulted or may probably result from the acquisition.*

129. Prior to 1953, Clorox Chemical divided its expenditures for advertising and promotion between advertising media and promotional activities, with a slightly greater expenditure for advertising.¹ In 1953, promotional expenditures in the form of factory allowances were temporarily dropped in favor of increased consumer advertising.² On the basis of an increasing awareness of intensified competitive activity, Clorox Chemical's advertising agency in 1955 recommended, in conjunction with continued national advertising, a return to the use of promotions on a national basis³ in order to provide a unified sales program for the selling force, to lengthen the peak selling season and to expand the number of household uses for liquid bleach.⁴ At the same time Clorox Chemical expressed an interest in the development of small-scale type promotions, inappropriate for national use, to be used as counters to localized competitive activity.⁵

Record support: ¹ Bellingall, Tr. 5023; RX 83.

² Bellingall, Tr. 5023-24. In 1947, Clorox Chemical, acting on its agency's recommendation, shifted its emphasis from educational type consumer advertising to advertising of a more competitive nature. This proved so successful that by 1953, promotional expenditures in the form of factory allowances were temporarily discontinued.

³ Bellingall, Tr. 5026-27.

⁴ Bellingall, Tr. 5031-32. Advertising and promotion encouraging new or additional uses helps all liquid bleach producers (Bellingall, Tr. 5035-36). Hearing Examiner said he would almost take official notice of this fact (Tr. 5036).

⁵ Bellingall, Tr. 5032.

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(a) Clorox has continued to use the same national promotions as were used by Clorox Chemical.

130. The first national type promotion put into effect by Clorox Chemical was the "Nylon-Rayon" promotion used in the spring of 1956.¹ This promotion was based on research conducted by Clorox Chemical, showing that liquid bleach could be used safely on synthetic fibers.²

Record support: ¹ Trimpe, Tr. 4410; Bellingall, Tr. 5032.
² Bennett, Tr. 4470; Bellingall, Tr. 5032-34.

131. The "Nylon-Rayon" promotion was essentially a one-time type of promotion and was not suitable for repetition. In the interest of developing a promotion on a national scale that could be repeated annually or semi-annually, the Fall and Spring Housecleaning type promotions were developed and first utilized in the fall of 1956,¹ and in the spring and fall of each year thereafter,² without change in the basic structure and concept of the promotion as originally devised.

Record support: ¹ Matson, Tr. 1138-39; Trimpe, Tr. 4409-10; Bennett, Tr. 4470-71; Bellingall, Tr. 5034.
² Bellingall, Tr. 5039-40.

132. The basic concept of the Spring and Fall Housecleaning promotion was to obtain in-store displays of Clorox in connection with high profit margin, slow-moving items, such as brooms, mops, waxes, polishes and pails.

Record support: Trimpe, Tr. 1301-02, 1357-58, 4895; Shaver, Tr. 1432-34; Bellingall, Tr. 5083-84; CX 214; CX 411, CX 412; RX 98 A-F, RX 99 A-Z 31, RX 100, RX 101, RX 102, RX 103, RX 104, RX 105, RX 106, RX 107.

133. Aside from recommending to their distributors the general types of related items for in-store displays, neither Clorox Chemical nor Clorox nor Procter has any control over the products displayed with Clorox as a part of the

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Spring and Fall Housecleaning in-store displays.¹ There is no proof from which any inference can be drawn that there has been or probably would be any change in this situation by reason of the acquisition.

Record support: ¹ Trimpe, Tr. 1303-4.

134. The ability of Clorox Chemical in the field of national promotion and the effectiveness thereof, prior to the acquisition, is demonstrated by the fact that for its Spring 1957 promotion, Clorox Chemical received a "Top Promotions of the Year Award" from *Food Field Reporter* based upon a survey among grocers as to which promotions the grocers considered to be more profitable for themselves.¹ A similar promotion in the spring of 1958 won the same award.²

Record support: ¹ Bellingall, Tr. 5041-43; RX 108.

² Bellingall, Tr. 5045. For its local advertising campaign in 1953, Clorox Chemical had also won an award from *Food Field Reporter* (Tr. 5044).

135. Except for refreshing the theme and motif of the Spring and Fall Housecleaning promotion, there has been no change in the basic structure and concept of the promotion as it was originally devised in 1956,¹ and as it has been continued since the acquisition. There is no proof, or any evidence from which any inference could be drawn, that these national promotions would be basically changed or expanded by reason of the acquisition.

Record support: ¹ Bellingall, Tr. 5040.

(b) *Post-acquisition local promotions of Clorox liquid bleach were not caused by the acquisition, but are of a type known to Clorox Chemical and were used to meet competitive developments arising after the acquisition.*

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136. In the household liquid bleach industry, as is generally true of consumer goods industries, it is usual and customary for one competitor to take notice of and seek to meet the competitive activities of another.¹ There are many different ways to compete and as many methods of meeting such competition. The choice of method, timing and frequency is a matter of judgment and selectivity.²

Record support: ¹ Hearing Examiner indicated "I will take official notice of that. Of course. That is human behavior." (Tr. 4370).

² Bellingall, Tr. 5210-11, 5214, 5326. ("We can't counter them [competitive promotions] all. They are going all the time.")

137. The national type promotions heretofore mentioned, in conjunction with national advertising, have been used by both Clorox Chemical and Clorox to meet the usual, day-to-day advertising and promotional activities of competitors in the household liquid bleach industry.¹ In those special situations, however, where increased and accelerated activity by competitors presented more than the usual threat to Clorox market position, small-scale promotions were developed to counter such localized competitive activity.²

Record support: ¹ Trimpe, Tr. 5544-5560; Bellingall, Tr. 5326.

² Bellingall: "Threat to our marketing position to warrant a counter promotion." (Tr. 5326); "Development of small-scale promotions as counters to localized competitive activity." (Tr. 5032)
Trimpe: "To counter the introduction of a new Purex bottle." (Tr. 5539)

138. Prior to the acquisition, advertising and promotional expenditures of Clorox Chemical were, in the main, spread evenly throughout the country but there were numerous exceptions, such as the use of radio spots in the southeastern United States, and varying promotional al-

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lowances dependent upon the particular territory in which used.¹

Record support: ¹ Bellingall, Tr. 5061-62.

139. With the initial marketing of the new patented Purex bleach bottle, Clorox was faced with one of its strongest competitive situations since at least 1955.¹ The new bottle was characterized by Purex as the "first major improvement in the packaging of liquid bleaches in the industry's history."²

Record support: ¹ Trimpe, Tr. 5545-46.

² RX 114, p. 7.

140. In order to counter the adverse competitive effect stemming from the introduction of the new Purex bottle in several major cities, Clorox utilized small-scale localized promotions or increased its local advertising. In other markets, Clorox did nothing. In still others it relied upon the national-type housecleaning promotions which were then being conducted in those markets,¹ to protect it from any substantial loss of its market position.

[Note: In response to a question by the Hearing Examiner, Trimpe stated that previously Purex and Roman Cleanser had introduced a three-quart bottle, and that Clorox Chemical immediately met the threat and got a bottle of its own. Clorox Chemical did not market its three-quart bottle, however, since it felt the trade would not accept it. (Tr. 5546).]

Record support: ¹ Trimpe, Tr. 5544-45; Shaver, Tr. 1425-26; Brown Tr. 1063.

141. These counter promotions consisted of the use of price-off labels in Erie, Pennsylvania and Evansville, Indiana, and the use of several other small local-type promotions such as label coupons, newspaper coupons, premium

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or merchandise packs and self-liquidating premiums.¹ These types of promotion had previously been used by other bleach producers including Purex itself, and were thoroughly known to the Clorox advertising agency and management.² None were used which had not previously been conceived or considered prior to the acquisition,³ some as early as 1955.⁴

Record support: ¹ Trimpe, Tr. 1326-27; Morgens, Tr. 3377-81; Bellingall, Tr. 5203-04.

² Trimpe, Tr. 1328-29; Bellingall, Tr. 5073. The Hearing Examiner stated that he had the impression from the testimony that Bellingall had in mind a number of promotion practices that were "well-known in the industry, in the advertising agency." (Tr. 5126.)

³ Bellingall, Tr. 5208.

⁴ Bellingall, Tr. 5298.

142. Since the acquisition, Clorox has also used a 5 cents off-label promotion in the Linco and Roman Cleanser marketing areas in Illinois, Wisconsin and Michigan.¹ This localized promotion was used to counter a series of 5 cents off-label packs which had been initiated by the manufacturers of Linco and Roman Cleanser bleaches.² This type of promotion had previously been used by other bleach producers, was well known to everyone and did not represent any new or unique promotion on the part of Clorox.³ The too frequent use, however, of a reduced price label for household liquid bleach tends to break down the basic price structure and to cheapen a prestige product,

Record support: ¹ Trimpe, Tr. 5546, 5584-85.

² Trimpe, Tr. 5546-48. Trimpe testified that after he joined Clorox Chemical he had taken certain measures, which had not worked out, to offset the effect of the cents off-label packs by Linco and Roman Cleanser. (Tr. 5548).

³ Hahn, Tr. 2149-50, 2169-70; Kunin, Tr. 2354-55; Olkin, Tr. 2449; Riccardi, Tr. 3030, 3033, 3037-38, 3080-84; Bellingall, Tr. 5073.

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such as Clorox, in the opinion of the Clorox account executive.

Record support: ⁴ Bellingall, Tr. 5094, 5301. The Hearing Examiner commented that he was familiar with the same problem in another industry. (Tr. 5094-5).

143. Since the acquisition Clorox has also used a self-liquidating ironing board cover premium promotion in the southeastern and southwestern areas of the United States. Such promotion was designed to counter increased competitive activity in these areas, such as was reflected in the decline in gallon sales in the southeastern United States.

Record support: Trimpe, Tr. 1327-28, 5574, 5579-80, 5590-92; Morgens, Tr. 3369.

144. Since the acquisition, when Clorox has used coupons and premiums in its localized counter promotions, it has utilized the Procter redemption services.¹ Independent agencies, are however, available to everyone for the distribution and redemption of coupons and premiums. Coupons distributed by these organizations may be included with coupons of other manufacturers, such as Coca-Cola. There is no proof that use of such independent agencies is more expensive or less effective than Procter's own services.²

Record support: ¹ Trimpe, Tr. 1386. Bellingall stated that in discussing whether to use Donnelly (an independent agency) or local collection services, Mr. Shaver suggested the use of Procter services. (Tr. 5288-89).

² Stoneman, Tr. 1935-36; Gardiner, Tr. 2895-96, 2904; Jones, Tr. 2977-78.

145. There is no proof that since the acquisition Clorox can purchase premiums on more favorable terms than

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any other bleach producer or on more favorable terms than could Clorox Chemical.

146. There is no proof that the utilization of any facilities of Procter with respect to the redemption of coupons or the purchase or redemption of premiums can or probably would result in any adverse effect on any competitor in the bleach industry.

147. There is no proof that the type, the timing or frequency of any of the small local-type promotions used by Clorox were a result of or affected by the acquisition.¹ There is no proof that these promotions were instituted by Clorox until there had been increased promotional activities on the part of its competitors.²

Record support: ¹ Bellingall testified in answer to a question whether this type of promotion had been affected by the acquisition: "No, the types of promotion that we have employed since the acquisition were thoroughly known to us." (Tr. 5073).

² Bellingall stated that after the merger, new competitive conditions made it desirable, from his standpoint, to use some of these promotions. (Tr. 5073-74). In testimony subsequently stricken, Trimpe stated that the acquisition had no influence on his decisions to use the various promotions to counter the Purex bottle. (Tr. 5544).

148. Such localized promotions as were used by Clorox since the acquisition were those deemed by its management to be necessary and desirable in the light of then existing competitive conditions in particular areas.^a It is not claimed by respondent that the business judgment of the Clorox management was in each instance correct as to the need, or lack of need, or as to the anticipated results, of each such promotion. There is no proof, however, that such business judgment was unsound or that its exercise was affected by any considerations other than normal and proper business factors. •

Record support: ¹ Bellingall, Tr. 5210-11, 5214, 5326.

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(c) *There are other types of promotions such as limited sampling and in-store broadcasting known to and sometimes used by producers of household liquid bleach.*

149. Any wide scale sampling of household liquid bleach is not reasonably probable since it cannot be sampled by mail and is not practical for door-to-door sampling. Because of its bulk, its weight and the high breakage factor, it is awkward and expensive for home delivery and dangerous to leave the sample unattended on the doorstep.¹ The factors which preclude wide scale door-to-door sampling do not, however, prevent limited sampling such as the Purex Nancy Sasser promotion,² the Clorox Cooking School demonstrations and Cradle Car Service, among others.³

Record support: ¹ Stoneman, Tr. 1691-92, 2016; Prescott, Tr. 2582; Buchman, Tr. 2789-90; Bellingall, Tr. 5074-75; Trimpe, Tr. 4420, 4955-56.
² Stoneman, Tr. 1904.
³ Shaver, Tr. 1488-89.

150. Independent merchandising services such as "Storecast" and "Beamcast" have been available to and used by household liquid bleach producers both before and after the acquisition.¹ Such organizations operate spot announcements in grocery stores and on FM (local) radio; check movement of advertised items; check inventory with the store manager to aid in the elimination of out-of-stock; install shelf space reservers to indicate facings allocated by the store manager; call to the attention of store managers any out-of-stock items;¹ obtain adequate distribution; obtain preferred shelf position; obtain increased shelf

Record support: ¹ Buchman, Tr. 2794, 2814-19 (The witness indicated that he received about 20 radio spots a week from Storecast); Gardiner, Tr. 2860-61, 2900.

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frontage; and obtain off shelf displays.² While such services are used by some national producers, they are particularly adaptable for use by regional or local producers, at costs which are relatively low.

[Note: In one instance, the management of a grocery chain (Loblaw) thought it necessary to restrict the activities of Beamcast representatives in seeking to obtain shelf space, and advised the supervisors of the chain that these representatives were not to "dictate" shelf facings. (Stipulation, Tr. 6041-2.)]

Record support: ² Buchman, Hr. 2816-18; Gardiner, Tr. 2860-61, 2905-2909; Bennett, Tr. 4511-18; Loblaw Stipulation, Tr. 6040-43; Beamcast Stipulation, Tr. 6052-55; RX 27.

151. In addition to those specific promotional methods previously discussed, there are many other types of promotional methods which have been used in the household liquid bleach industry, such as contests, count and recount, banners, pennants and window bolsters, among others. There is no proof that any advantage, as a result of the acquisition, results or probably could result to Clorox if it were to use these or any of the several types of promotional devices.

Record support: See Finding 103 for references to these promotions.

E. THERE HAS BEEN NO INCREASE IN THE RATE OF SPENDING FOR THE ADVERTISING AND PROMOTION OF CLOROX LIQUID BLEACH SINCE THE ACQUISITION AND NO PROOF THAT AN INCREASE IS PROBABLE OR ECONOMICALLY JUSTIFIED.

152. Clorox has not spent more per case for advertising and promotion than Clorox Chemical did prior to the acquisition.¹

Record support: ¹ Morgens, Tr. 828; Towers, Tr. 4645; Bellingall, Tr. 5059-60; RX 83.

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153. The per case rate expenditure by Clorox for advertising and promotion in the initial fiscal period following the acquisition (that ended June 30, 1958) was slightly lower than the average for the five-year period ended June 30, 1956, and was equal to the advertising and promotional expenditure for the fiscal year ended June 30, 1957.

Record support: Towers, Tr. 4645; RX 83.

154. The per case rate expenditure by Clorox Chemical and by Clorox for advertising and promotion has been stable (although there have been minor variations) since 1953.¹ The present per case rate was established through experience and it effectively serves the advertising and promotional needs of the Clorox brand.²

Record support: ¹ Bellingall, Tr. 5059-60.
² Bellingall, Tr. 5065.

155. Although, in line with increases in total case sales by Clorox and by the bleach industry generally, the total dollar advertising and promotional expenditures of Clorox for the first year following the acquisition showed an increase over those expenditures for the preceding year, the per case rate remained constant due to the increased number of cases sold.¹ The total expenditures, however, do not represent a corresponding increase in the total volume of advertising and promotion actually obtained, because advertising costs increased substantially in the year following the acquisition.²

Record support: ¹ Bellingall, Tr. 5258-59, 5272-73; RX 83.
² Bellingall, Tr. 5077-78, 5267-74.

156. The amount of expenditures for advertising and promotion suitable for Clorox would not necessarily be

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suitable for other consumer goods, such as those sold by Procter. Each brand meets competitors in its own particular industry and has its own rate of turnover. Hence, the rate of expenditure that can be economically spent in advertising and promoting each particular brand is individual as to it, taking into account all marketing circumstances and conditions.

Record support: Bellingall, Tr. 5069-70.

157. The total amount expended by Procter in advertising and promoting all of its products, or any one of them, has no significance and is meaningless in comparison to the amount that should be spent or might with reasonable probability be spent in advertising and promoting a particular brand in the household liquid bleach field.¹

[Note: The Hearing Examiner commented: "We cannot, it seems to me, measure the amount of money that Procter & Gamble should be required to spend, or should spend, in the liquid bleach industry, by what it may have spent in a detergent industry, or some other industry." (Tr. 541)]

Record support: ¹ Morgens, Tr. 531, 665.

158. No valid conclusion, supported by the record, can be reached as to the amount of advertising and promotional expenditures appropriate for Clorox, which advertises nationally, as compared with the amount of such expenditures appropriate for liquid bleach producers who distribute locally or regionally.

159. Clorox has, since the acquisition, maintained its own advertising department, separate from Procter's, and

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has its own advertising agency.¹ There is no proof that any change in this arrangement would be advantageous either to Clorox or Procter. Nor is there any proof that any such change is reasonably probable. In fact, Procter itself uses various advertising agencies for its major product brands.²

Record support: ¹ Shaver was advertising manager for Clorox Chemical and continues with new Clorox. The advertising agency is the same. (Morgens, Tr. 488). All advertising and sales personnel and the advertising agency of Clorox Chemical have been retained. (Brown, Tr. 1043). Bellingall was the account executive in 1955. (Trimpe, Tr. 4413). Honig-Cooper has been the advertising agency for Clorox since 1928. (Bellingall, Tr. 5011).
² Morgens, Tr. 572.

160. The undisputed evidence shows that an increase in the per case rate expenditure for the advertising and promotion of Clorox would not be economically sound. No such increase has been recommended by the agency or suggested by Procter or Clorox.¹ Nor is there any evidence that any such increase is reasonably probable.

Record support: ¹ Bellingall, Tr. 5065-73, 5121-22, 5259-60.

1. *There is no proof that the availability of additional funds by reason of the acquisition will result in any advantages to Clorox, in terms of advertising or promotion or otherwise.*

161. Clorox Chemical, at the time of the acquisition, had approximately \$4 million in cash and marketable securities, an amount in excess of the needs of its business.¹ This amount was available for any increase in its advertising and promotional expenditures which might have been deemed desirable. Neither the Clorox Chemical management nor its advertising agency was, through lack of

Record support: ¹ Morgens, Tr. 498-9.

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funds or otherwise, limited in or precluded from engaging in any additional advertising or promotional programs which they deemed desirable.²

Record support: ² Matson, Tr. 1153; Trimpe, Tr. 4860-61; Bellingall, Tr. 5073, 5266; CX 13.

162. There is no proof that at the time of the acquisition, or since, Clorox needed or could use any additional funds from any source, for advertising, promotion or any other purpose, or that the acquisition has made available to Clorox any additional financial advantages which could be or might with reasonable probability, be used by Clorox.¹

Record support: ¹ Mr. Morgens testified that with the exception of introductory periods for new products, each Procter brand earns its own advertising and promotional money. There is no pool of funds on which a particular brand may draw for advertising and promotional monies if it is not earning its way. (Tr. 569, 601).

F. THE ACQUISITION HAS NOT HAD AND THERE IS NO PROOF THAT IT PROBABLY WILL HAVE THE EFFECT OF LESSENING COMPETITION OR TENDING TO MONOPOLY BY REASON OF ANY ADVANTAGES IN TERMS OF SHELF SPACE OR OTHER ASPECTS OF MARKETING THROUGH GROCERY STORES.

1. *Shelf Space (General considerations relating thereto).*

163. Neither Clorox nor Procter can or does, nor is there any reasonable probability that either can or will, control the amount or location of grocery store shelf space.

[Note: Basic to the problem of shelf space, as will be indicated in subsequent findings, is that physical limitations of space in any grocery store, no matter how large, make it impossible for any grocer to stock all brands of any given product and also make it impossible to accord all products which are stocked the

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same amount of shelf space or the amount which any producer would like to receive. Unquestionably these limitations have an impact upon the volume of sales of any brand of merchandise which is generally marketed through such stores.

It is our position, however, that if there be imperfections in the operation of the competitive system by reason of any scarcity of distribution channels which are available to manufacturers, no claim can be made that this aspect of grocery store marketing has been influenced or controlled by either Clorox or Procter or that it furnishes any criterion for gauging any alleged anti-competitive effects resulting from the acquisition, or that it will be affected in any way by the acquisition. Both Clorox and Procter, as well as substantially all other manufacturers of products which move through grocery stores, must take this distribution system as they find it. This situation has not been affected by the acquisition.]

Record support: Morgens, Tr. 602-3; Eubanks, Tr. 4588; Loblaw Stipulation, Tr. 6039-43.

164. Shelf space is and has been controlled by the grocery store or chain. In the case of grocery chains the decisions as to the allocation and location of the shelf space for any product are generally made by the local store manager but in some instances are made by a chain's regional or divisional management.¹

Record support: ¹ Morgens, Tr. 739-41; Leazar, Tr. 4028; Eubanks, Tr. 4588.

165. The amount of shelf space allocated to an established product in a grocery store is and has been mainly influenced by the movement, i.e., sales, of the individual product.

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[Note: The Hearing Examiner stated that the shelf space allowed any commodity depends upon the movement of the product (Tr. 4448).]

Record support: Stoneman, Tr. 1554; Kunin, Tr. 2366; Olkin, Tr. 2452; Brower, Tr. 2698; Riccardi, Tr. 3048; Leazar, Tr. 4028-9; Beamcast Stipulation, Tr. 6054.

166. Movement of any product through a grocery store in turn depends upon a number of factors including quality, price, personal relationship of salesmen, attractiveness of package, novelty of the item, experience and familiarity of consumers with the product, as well as advertising and promotion and no one factor can be said to be determinative.

[Note: The evidence is succinctly summarized in the comment of the Hearing Examiner to the effect that shelf space is allocated "in proportion to what is going to make him [the retail merchant] the most money. The storekeeper is interested in profits on the moving stock. Naturally he is going to give the shelf space to the stock that is moving." (Tr. 4453).]

Record support: Stoneman, Tr. 1554; Smooke, Tr. 1761-62; Kunin, Tr. 2367; Olkin, Tr. 2453; Prescott, Tr. 2576; Buchman, Tr. 2790, 2793-2794; Riccardi, Tr. 3048; Leazar, Tr. 4073-74, 4079-80; Euhanks, Tr. 4623. Gardiner testified that advertising and promotion had little if any effect on the amount of shelf space obtained. (Tr. 2875).

167. In practice, the faster moving products do not receive as much shelf space as their movement justifies.¹ Likewise, many slower moving products receive shelf space in excess of that which would be justified by their movement.² All manufacturers continuously seek to improve the shelf space accorded to their respective products.³

Record support: ¹ Leazar, Tr. 4065; RX 60; RX 61.

² Morgens, Tr. 514; Leazar, Tr. 4028.

³ Morgens, Tr. 512-3; Brower, Tr. 2698; Bennett, Tr. 4510.

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[Note: As stated by the Hearing Examiner, "I have never seen any manufacturer satisfied with the amount of shelf space he got." (Tr. 4449).]

(a) Factors affecting the "stocking" of liquid bleach and the shelf space allocated to it.

168. The number of brands of liquid bleach customarily stocked in grocery stores varies. In certain stores or chains three brands are stocked, in others four, in others five.

Record support: Stoneman, Tr. 1551; Kunin, Tr. 2367; Prescott, Tr. 2582-83; Brower, Tr. 2700; Gardiner, Tr. 2872; Leazar, Tr. 4013-14; Eubanks, Tr. 4572-73; Bissmeyer, Tr. 4849.

169. Generally grocers stock and price liquid bleaches so as to afford their customers a choice as to both brand and price. The evidence indicates that customarily Clorox and at least one competing premium quality bleach are offered for sale on the grocery shelves at the same or substantially the same retail price. Also, customarily another brand or brands is on the grocery shelves which is sold at a lesser price, the differential varying in different areas and different stores.

Record support: Morgens, Tr. 504; Bissmeyer, Tr. 4852.

170. Grocery chains can and do sell liquid bleach profitably under their private labels at a lower price than they generally charge for a producer's brand.

Report support: Bissmeyer, Tr. 4847, 4849; Trimpe, Tr. 4932.

171. Grocery chains which have a private label liquid bleach customarily allocate the most advantageously located shelf space to their private label brand and also allocate a larger proportion of shelf space to such bleach than is allocated to any of the other competing brands on the

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shelves. For this reason, private label liquid bleach is a significant competitive factor affecting the allocation of shelf space and the availability of such shelf space for Clorox or any competitive brand of liquid bleach.

[Note: When the Winn-Dixie chain introduced its private label bleach in Miami and Tampa, it allocated 50% of the space to its own private label bleach and the balance of the space was redistributed among the other liquid bleach brands proportionately (Tr. 5556). Since Clorox initially had more space than competitive brands, it consequently lost more space (Tr. 5557-58). This greatly affected sales of Clorox and practically killed sales in the gallon size (Tr. 5559-60). The effect of competition from private label bleach generally in the Southeastern United States was a loss of 20% in market share of Clorox in the gallon size (Tr. 5574, 5579-80, 5590-92).]

Record support: Trimpe, Tr. 4862, 4933. Although Clorox may not have been completely eliminated from a store because of the introduction of a private label, it has lost some sizes in which it was previously carried.

172. There is no proof that any manufacturer or producer of consumer goods moving through grocery stores can command consumer acceptance or can command valuable grocery store shelf space.

[Note: There is no proof that Procter has any peculiar or unique abilities to "command" any consumer acceptance of Clorox. Moreover, there is no proof that any Procter brand had ever achieved as wide a consumer acceptance in its particular field as had Clorox in the liquid bleach market.

In so far as any ability to command shelf space is concerned, the only evidence on the subject establishes that Clorox, prior to the acquisition, had a larger percentage of shelf space in relation to movement than did Procter's product COMET—its only product in the

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cleanser field. (Nickelson, Tr. 4776-77, 4780-82; RX-95).]

2. *The addition of liquid bleach to respondent's "line" of cleansing and laundry products does not increase the ability of Procter or Clorox to increase shelf space or sales and is no competitive disadvantage to competing companies.*

173. There is no proof as to what products constitute "a complete line" of cleansing and laundry products, and there is no proof as to the existence of any such "complete line", as alleged in the complaint.¹ The usual product line of the bleach producers who testified for the complainant includes in addition to liquid bleach, blueing, ammonia and liquid starch,² none of which are manufactured by respondent.³

Record support: ¹ Complaint, Par. 14.

² Smooke, Tr. 1754; M. Giachetti, 2068; Kunin, Tr. 2345; Olkin, Tr. 2440; Rinaldi, Tr. 2511; Prescott, Tr. 2564; Brower, Tr. 2658; Buchman, Tr. 2744; Jones, Tr. 2915; Mendleson, Tr. 3149.

³ Morgens, Tr. 834-837.

174. Household liquid bleach is usually stocked in that section of a grocery store which includes starches, blueing, mops, buckets and other products in that general merchandise category.¹ This section is generally in the household cleaning division of the store.² A Nielsen survey which is undisputed shows that in over 60% of the stores included

Record support: ¹ Morgens, Tr. 613-4; Leazar, Tr. 4030; Bennett, Tr. 4468-69, 4496; Eubanks, Tr. 4599, 4630.

² Gardiner, Tr. 2877; Stoneman, Tr. 1548; Brower, Tr. 2708-9; Buchman, Tr. 2796. Other witnesses for complainant testified that generally bleaches were stocked with the soaps, detergents and cleansers but their testimony is consistent with a finding that bleaches are generally stocked in the general household supplies or cleaning division of the store. (Olkin, Tr. 2466; Prescott, Tr. 2596-97; Rinaldi, Tr. 2524-25; Jones, Tr. 2942; Mendleson, Tr. 3181).

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in the Nielsen survey group, household liquid bleach is not stocked immediately adjacent to package detergents or toilet soaps.³

Record support: ³ RX 96. Mr. Nickelson stated that if liquid bleach was intermingled on the shelf with detergents and soaps, it would be classified in the "immediately adjacent" category of the survey (Tr. 4790). The percentage of stores in which liquid bleach is not stocked immediately adjacent to package detergents and toilet soaps is over 71% if the individual stores in the survey are weighted according to the dollar volume of business which they do (RX 96).

175. The fact that one company manufactures or produces and sells a number of products does not increase its ability to secure shelf space.

Record support: Leazar, Tr. 4030, 4061; Eubanks, Tr. 4589.

176. Neither Procter nor any other manufacturer has any power to force sales of one or more products upon a wholesaler or retailer by virtue of the fact that such manufacturer offers other products for sale through the same channels of distribution.

[Note: The witness Leazar, an executive of a grocery chain, in testifying as to any power on the part of Procter to force the purchase of Clorox in order for a retailer to obtain other Procter & Gamble products, said: "[It] just seems asinine to me because we run our own business. And no one has ever and I hope will never force us to buy anything we don't need. I would definitely say that is an impossibility." (Tr. 4031)]

The witness Eubanks, a grocery merchandiser for the Kroger Company, who had supervision and control over the purchasing of products such as liquid bleach, soaps, detergents and cleansers, testified that: "I don't see how they [Procter] can possibly force us to buy the product." (Tr. 4598).

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The testimony of these two witnesses was uncontradicted. Indeed, counsel for complainant, addressing himself to the quoted testimony of the witness Eubanks, stated that there was no allegation that Procter could force any grocer to buy anything (Tr. 4598). Despite this statement, counsel apparently determined, upon reflection, that he should qualify it and said: "No claim [of forcing] was withdrawn." (Tr. 4629).

In any event, we think that the undisputed testimony referred to above effectively refutes all implications contained in the complaint respecting any "power" of respondent to influence or affect the sale of Clorox through grocery stores by reason of the fact that it also produced other established products.]

Record support: Leazar, Tr. 4031; Eubanks, Tr. 4598.

177. Likewise, there is no proof that the association of Clorox with other products manufactured by Procter would increase consumer demand for Clorox or increase its ability to secure shelf space.

178. Procter, as well as many other advertisers of consumer goods, customarily features the brand name and not the company name. It is doubtful that the housewife associates the name "Procter & Gamble" with the brands sold by Procter.¹ There is no proof that Procter's name has been or will be used in conjunction with Clorox for the purpose of influencing consumer acceptance. Further, there is no proof that if so used any advantage would result.

[Note: Buttrressing the above finding is the uncontradicted testimony of Bellingall that the prestige of Clorox was greater in the bleach field than that of Procter's products in their respective fields (Tr. 5089). Likewise, Trimpe testified without contradic-

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tion, that Procter brands did not have as much acceptance as Clorox in most of the Clorox sales territory (Tr. 1358). In this connection Morgens testified that Clorox had a higher market share than any Procter brand (Tr. 658).

Moreover, such "prestige" as Clorox enjoyed existed prior to, and was not affected by, the acquisition. In fact, complainant has contended that prior to the acquisition, the word "Clorox"; itself, was a household word (Tr. 15).

It can also be expected, as indicated by the Hearing Examiner, that in areas where smaller bleach producers enjoy local prestige, they too, can be expected to have the bulk of the business (Tr. 4880-1).]

Record support: ¹ Bellingall, Tr. 5088-91; 5290-91.

179. There is no proof that any advantage would accrue to Clorox from tying in the merchandising of Clorox with Procter brands or brands of other national manufacturers of consumer goods moving through grocery store channels. There is testimony that a prestige product like Clorox would have little to gain and might have something to lose through diffusing advertising impact and impression by means of such a tie-in.¹

Record support: ¹ Bellingall, Tr. 5082.

180. The absence of any power on the part of Procter to increase shelf space allocated to Clorox or to force sales of Clorox is demonstrated by the fact that many chain stores which carry certain Procter brands do not carry others and from time to time discontinue the purchase and resale of other Procter products.¹

Record support: ¹ Morgens, Tr. 741-2; Leazar, Tr. 4029, 4069-70; Eubanks, Tr. 4589, 4623-4, 4626.

*Proposed Findings of Fact***VII. The Testimony of Certain Representatives of Competing Bleach Companies, Offered by Complainant, Fails to Establish That the Acquisition will Probably Result in Any Lessening of Competition or Tendency to Monopoly.**

[Note: In accordance with permission granted by the Hearing Examiner (Tr. 3865) Procter is renewing its motion to strike, as incompetent, the testimony of representatives of competing bleach companies as to their opinions concerning the effect of the acquisition.]

181. The opinion testimony of Clorox's competitors as to anti-competitive factors resulting from the acquisition is insufficient to sustain complainant's burden of proof as to any lessening of competition.

[Note: In preceding proposed findings, we have treated with the evidence as it relates to various aspects of the bleach business as to which the complainant has asserted that anti-competitive results might probably occur. We emphasize that with respect to none of them has the complainant shown any violation of Section 7. There remains only the testimony of representatives of competing bleach manufacturers. Certain of such witnesses were permitted to express their opinion as to "the effect, if any, of the acquisition" upon the business of their respective companies. We here set forth an analysis of that testimony. We submit that such analysis requires the making of the above Finding.

In most instances, the bias of these competitors and their self-interest is evident from the transcript. Apart from this, however, it is our position that their testimony is lacking in that degree of specification which is required to give it any probative value. Moreover, the speculation and conjecture indulged in by certain of these witnesses, as to what might be the

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results of the acquisition, is directly in conflict with certain indisputable facts contained in the record.

The representatives of thirteen competing bleach manufacturers testified.

Representatives of two, namely, the Hood Chemical Company and Ladies Choice Foods, were not interrogated as to their opinions concerning the effect of the acquisition. Since a question concerning such an opinion was uniformly asked of a representative of each other competitor, we suggest that it is in order to invoke the presumption that had these witnesses been similarly interrogated their answers would have been adverse to the complainant. As to the others:

(1) *Stoneman—Purex Corporation, Ltd.* The testimony of this witness as to the effect of the acquisition upon the business of the Purex Company should be wholly disregarded. He testified that in his opinion the acquisition "will have a serious effect upon Purex's business, and Purex's ability to compete in the liquid bleach business." He coupled this with the qualifying statement "particularly if the same promotion devices which are normally used by Procter & Gamble are applied to the liquid bleach business" (Tr. 1814-5). We strongly urge that this testimony and the implications therein are effectively disproved by the record:

(a) Purex's business conduct subsequent to the acquisition belies any concern as to its ability to compete. Although Mr. Stoneman had also stated that the bleach industry was not one in which Purex wished to expand, the evidence shows that it purchased the John Puhl Co., manufacturer of the FLEECY WHITE brand of liquid bleach, more than a year after the acquisition and thereby greatly expanded its plants and sales area. This is not the conduct of one who fears that his ability to compete has been lessened. Rather we think it demonstrates, objectively and undeniably, that the acquisition is not regarded by Clorox's largest competitor as a deterrent to com-

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petition or a limitation upon future successful operation in the liquid bleach business;

(b) More specifically, however, far from having any "serious effect" upon Purex's business, the actual sales figures (as will be set forth in subsequent findings in Section VIII hereof) show that sales of the Purex brand of liquid bleach in the year after the acquisition increased by more than one and a quarter million dollars over the sales of the preceding year; and that this was the largest increase in sales enjoyed by the Purex Company in any of the preceding four years. These sales were in addition to Purex's increasing volume of liquid bleach for sale under the private labels of some thirty-five grocery chains;

(c) In addition, the Purex financial figures and reports in evidence show that it is a growing and expanding company. No basis exists for an attempt to portray it as a pigmy in the bleach industry. Nor does any basis exist for any conclusion that it does not have the resources or the competency to compete aggressively and profitably.

The true situation as to Purex's future is best revealed by the statement in its 1958 annual report (RX 114) published more than a year after the acquisition: On p. 14 of that report there is the statement that: "we feel sure acceptance of our Purex liquid bleach will be greatly enhanced."

(2) *Giachetti—Linco Co.* This witness envisaged the possibility of adverse effects on his company growing out of the resources available to Clorox and the types of promotion used by Procter in putting out a new item. The witness testified that if these increased promotional activities were engaged in, Clorox would be able to get "probably more shelf space than competition" and that if all of these things happened they would "eliminate the small manufacturer like us." (Tr. 2089-90).

Here again, there is nothing to support the prophecies of this competitor. For this "small manufac-

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turer", by his own admission, controls the major share of the market in the important Chicago metropolitan area and sold between 45% to 50% of all household liquid bleach sold in that area after the acquisition. Moreover, the witness further testified that Linco's sales of liquid bleach were increasing at the time of his testimony. These cries of "Wolf" by an aggressive and successful competitor are without substance.

(3) *Olkin—Rose-Lux Chemical Co.* In stating that the acquisition would be "bound to hurt our business" the witness first based this upon a premise which is contrary to the "facts of life" in the marketing of consumer items through grocery stores. He adopted the approach that Procter through "the full line forcing tactics" could use Procter's products as a "wedge to make [Procter's] customers buy more Clorox than they had been buying before." We submit that the evidence conclusively demonstrates that no such power exists on the part of Procter or any other manufacturer of items sold through grocery stores. (Also see Note to Finding No. 176 as to statements by complainant's counsel.)

The witness further said that if Procter applied the same promotion tactics to bleach as it did to soaps and detergents, it would ruin his business, because he could not afford to do anything like it and stay in business. The "if" upon which this answer was predicated has in no way been shown to be probable or likely in the liquid bleach industry. (Tr. 2470-71)

(4) *Rinaldi—No Worry Chemical Company.* This witness' answer to the pertinent question was indeed enigmatic, if not completely meaningless. His statement was that if Clorox was "going to go out and put deals on, I do not think we are going to last any longer than we have lasted now." (Tr. 2530). The witness is, of course, still in business and there is no evidence that his sales or market share have decreased since the acquisition.

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(5) The testimony of five of the remaining competitors may be treated collectively. In essence, they expressed the opinion that if more aggressive merchandising and competitive activities were engaged in by Procter, their respective businesses would be adversely affected. None of these witnesses testified that it was threatened with failure or elimination. Typical of their opinion testimony are the following expressions:

(a) That if the promotions of the Clorox Company were continued and in addition other types of promotions were used, these "would definitely be harmful to our business" (*Prescott—J. L. Prescott Co.*, Tr. 2600).

(b) That because Procter would be able to use its experience in other products to increase sales of liquid bleach it would be more difficult to sell against a stronger competitor (*Brower—Sunlight Chemical Co.*, Tr. 2716-17). This witness recognized, however, that when a large competitor "pushes a product", such advertising brings it to the attention of more people and results in greater increased consumption, so that all elements in the industry benefit. (Tr. 2717)

(c) That he had learned to "live with Clorox" and was a "little bit apprehensive" of what might happen if Procter's methods of advertising and promotion were applied to the bleach business (*Buchman—Savol Bleach Company*, Tr. 2800-1). Moreover, this witness had testified that when he purchased his bleach business he had agreed with the sellers that he would only sell the Savol Bleach within a radius of 35 miles of Hartford, Connecticut. (Tr. 2776)

(d) That the witness was "scared" of the acquisition because he believed that Procter could promote Clorox better and cover the trade cheaper (*Gardiner—Gardiner Manufacturing Company*, Tr. 2881).

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(e) That if forms of merchandising such as only the soap people "know how to employ" were used, he would be in trouble (*Jones—Jones Chemical Company*, Tr. 2955-6).

Even if these statements were taken at face value, there is nothing which would justify a conclusion that any "lessening of competition" would result. At most, these witnesses were voicing concern as to the impact of what they guessed might possibly be additional competition. It is common knowledge that any business man—or any professional man—always views with suspicious concern any change of any kind by a competitor.

Thus, we submit that a competitor's statement that it will be more difficult for him to compete establishes nothing in terms of a violation of Section 7. The anti-trust laws are not designed to give any competitor a preferred or insured position in the market place.

This premise was aptly stated by the Examiner in ruling upon questions directed to the effect of competitive efforts in the business during the examination of Robert Prescott. He there stated (Tr. 2593-4):

"HEARING EXAMINER HAYCRAFT: I understand your question was whether he had lost any business, any accounts. Of course, anybody that is familiar with business of this kind at all knows, yes, certainly, anybody, everybody is going to lose some business and pick up more."

* * *

"It is just like night follows day that anybody that is in this business, and the competitive forces playing, some are going to lose business, some are going to lose customers and others are going to pick them up and they are going to pick up some."

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"That's what competition is. So what? That's a normal situation. Why go into it? I just don't think there is anything in this case, any of the issues in this case which would warrant that."

Moreover, although these five witnesses testified some months after the acquisition, no one of them stated that his business had been adversely affected, and such evidence as was introduced on the subject showed that the business of all of them had increased in the period prior to their testimony.

(6) *Riccardi—Roman Cleanser Co.* This witness refused to indulge in unfounded speculation as to any adverse effect of the acquisition. When asked as to the effect that the acquisition would have on his business, and testifying almost one year after the acquisition, he said: "Now I do not see any changes." (Tr. 3056). The witness was later asked: "What kind of change in the method of selling Clorox will it take to affect your business?" He answered: "I do not know." (Tr. 3057).

Here was a successful, established competitor with a net worth of approximately two million dollars (Tr. 3064). There is nothing in his testimony to support any claim that any anti-competitive results would occur. Moreover, although sales of the Roman Cleanser brand had decreased after the acquisition, the witness attributed such decline to unemployment in the Detroit area (Tr. 3065). Had he had any thought that the acquisition had contributed in any way to such decline, he certainly would have said so.

(7) *Mendleson—B. T. Babbitt, Inc.* We have previously commented on this testimony (see Note to Findings Nos. 64 and 195). The witness admitted that for a year prior to the acquisition his company had not promoted or advertised the Vano liquid bleach "since the franchise of Clorox was so strong." The so called "franchise", of course, referred solely to the

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position of Clorox Chemical, *prior to the acquisition* and was in no way due to the acquisition.

Finally, any evaluation of the testimony of these witnesses must take into account what they did *not* say as to the effects of the acquisition. No one of them suggested that the acquisition would result in any predatory "price-cutting" such as was found to have resulted *from the acquisition* in *In the Matter of Reynolds Metals* or "vicious" pricing policies resulting in prices below competitors' costs (such as was involved in *In the Matter of Pillsbury*) or the giving of premiums to induce jobbers' salesmen to push a brand, or premiums to supermarkets to induce them to purchase a brand (practices adverted to in *In the Matter of Pillsbury*). Nor have any of such practices been shown to exist in the marketing of Clorox, and there is no proof of any probability that there will be any resort to them.

At the most, the concern expressed by representatives of these competitors related solely to surmises as to possible increased competition, stemming entirely from the use of admittedly proper competitive activities. As to all such activities, we again emphasize that the evidence demonstrates that Clorox Chemical Company, had there been no acquisition, was in a position where it could have undertaken all of them. Every aspect of advertising or promotion, about which any witnesses expressed "apprehension", could have been engaged in by Clorox Chemical without acquiring any additional financial assistance, or any additional advertising or promotional access, know-how or technique.

We have set forth this extended analysis of the testimony of these competitors in order to demonstrate that, even assuming the competency of such testimony, it has no controlling significance on the real issue

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here. We have, of course, contended throughout this proceeding that opinion evidence of this sort is inadmissible. Regardless of how that question may be decided, we point to a statement by the Commission itself as to the inconclusiveness of this type of evidence. Referring to the weight to be attached to such opinion testimony, *even in preliminary investigations* conducted by the Commission, it has stated:

"If a company representative is asked to go beyond facts of record and to give his opinion concerning the future consequences of an acquisition for his company, or for the market as a whole, the opinion can carry no greater weight than the facts on which it is based." *Federal Trade Commission Report on Corporate Mergers and Acquisitions*, p. 200 (1955).

Here the opinion testimony in question is based on sheer guesswork and speculation. In addition, the lack of factual substance is compounded by the failure of the witnesses to recognize that the future activities, as to which they expressed concern, all could have been engaged in had there been no acquisition. There is nothing in the record to support the conclusion that the acquisition, as such, would have any effect whatsoever upon future conduct.

Thus, we submit, the complainant's failure, in other respects, to establish that the acquisition will result in the probability of a lessening of competition or tendency to monopoly, has not been cured by the testimony of Clorox's competitors.]

VIII. The Acquisition Has Not Had and There Is No Reasonable Probability That It Will Have any Effect Upon the Market Position of Clorox Liquid Bleach.

A. GROWTH TRENDS IN THE TOTAL SALES OF HOUSEHOLD LIQUID BLEACH.

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182. The total sales of household liquid bleach in the United States through grocery stores have increased annually from August 1, 1953 to July 31, 1958 as follows:¹

(1)	(2)	(3)	(4)
<i>Year Ending July 31</i>	<i>Total Dollar Sales (000)</i>	<i>Annual Dollar Sales Increase (000)</i>	<i>Percent- age Increase</i>
1953	\$ 71,571	—	
1954	75,087	\$3,516	4.9%
1955	82,070	6,983	9.3%
1956	89,234	7,164	8.7%
1957	95,948	6,714	7.5%
1958	105,093	9,145	9.5%

Record support: ¹ RX 94; also RX 93 and RX 117. The first two columns above are direct quotations from RX 94. The annual increase, column 3, is arrived at by subtraction. The percentage increase in column 4 is a matter of computation which has been checked and is corroborated by the third column of CX 683 as far as it applies to annual figures for the same periods.

RX 94 covers years ending July 31, which Nielsen period is as near as any other to the fiscal year of Clorox and of Purex. More important is the fact that July 31 coincides with the date of acquisition (August 1, 1957) and the annual anniversary date thereafter. This is the only Nielsen annual period which presents the annual situation after the acquisition and the annual situations before the acquisition. For this reason this period is used throughout the findings wherever available.

This evidence as to growth trends is in no way contradicted by certain data contained on CX 683 in which complainant attempts to compare total annual sales with sales for a four-month period (August-November, 1958). The invalidity of the comparison is apparent. It does not take into account seasonal and other factors in this particular period, which complainant's counsel conceded was part of the season during which bleach sales were at their lowest ebb (Tr. 4755-56). (Also see later discussion under Finding No. 185, Note, 3rd paragraph).

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[Note: The foregoing figures and those appearing on succeeding pages with respect to household liquid bleach moving through grocery stores are based upon the Nielsen Food Index reports and exhibits prepared therefrom which were offered in evidence, the purpose and source of such evidence having been specifically stated. The accuracy of Nielsen figures was stipulated by both parties at the instance of complainant (Tr. 2066-A-2066-B).]

183. In the 12-month period following the acquisition, the growth in total sales of household liquid bleach in the United States was greater than the growth in each of the previous corresponding years. During this 12-month period, total sales increased by \$9,145,000. Also, the rate of growth was higher in the year following the acquisition than in any of the preceding four years, and was 2 percentage points higher than the growth in the 12-month period immediately preceding the acquisition.

Record support: See preceding finding.

B. MARKET POSITION OF CLOROX LIQUID BLEACH BEFORE AND AFTER ACQUISITION.

184. The Clorox market share of the total sales of household liquid bleach in the United States, moving through grocery stores, in the year following the acquisition, as compared with such share in preceding years, was as follows: ¹

<i>Year Ending July 31</i>	<i>Clorox Share</i>	<i>Increase in Share</i>
1953	45.3%	—
1954	46.4%	1.1%
1955	47.1%	0.7%
1956	47.7%	0.6%
1957	48.4%	0.7%
1958	48.7%	0.3%

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[Note: Paragraph 8 of the complaint alleges that in 1956 Clorox produced and sold approximately 48% of all household liquid bleaches marketed in the United States. Actually, for the 12-month period preceding the acquisition, the Clorox share was 48.4%, based upon the Nielsen consumer dollar figures. It is apparent that the percentages referred to in the complaint were on a consumer dollar basis, since on any other basis the allegation would be materially wrong. If the 32-ounce or other equivalent unit basis were used, the Clorox share of market would be less. For example, the Clorox share of market on a 32-ounce equivalent basis for the 12-month period following the acquisition was 45.8% and its share for October-November, 1958, the latest Nielsen tabulations available at the conclusion of the hearings, was also 45.8% (RX 113).

Hence, unless otherwise indicated, Nielsen's market share figures will be based on consumer dollars.]

Record support: RX 94.

185. The increase in Clorox's market share, i.e., 0.3% of one Nielsen point, was the lowest experienced by the product in any of the years from 1953 through 1958, was less than one-half the increase in the 12-month period immediately preceding the acquisition, and represented a decline in the rate of growth evidenced in all other preceding periods.

[Note: For the purpose of making market comparisons for comparable time periods Nielsen figures have been offered in various ways and for various periods of time.

Mr. Nickelson, whose qualifications as an expert to interpret such Nielsen figures were unchallenged, stated that annual figures are best for appraising trend of market. This is because annual figures erase seasonal influences (Tr. 5469-70). The Hearing Ex-

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aminer has at least twice commented on the desirability of figures on an annual basis (Tr. 2047 and 4997). Complainant's witness, Mr. Stoneman, testified that a trend in a product cannot be established "in a period of 6 months, in one given year, in one segment of the territory" and that it is necessary to compare more than one comparable period (Tr. 5631-32).

During the case, the complainant, as well as the respondent, has objected to periods shorter than one year as, for example, periods of 4 months. The respondent brought out from the Nielsen figures, previously identified in a Stipulation entered into at the instance of the complainant (Tr. 2066A-B) the loss in the Clorox share of market during the 4-month period from August 1 to November 30, 1957 (RX 93). Whereupon, the complainant objected on the ground that the respondent was offering to show these 4 months in comparison with the preacquisition year ending July 31, 1957 (Tr. 4755-56).

In view of this objection and the discussion which followed, the respondent prepared and had identified RX 94 which places the comparison on a 12-month basis up to and after the date of acquisition. Later in the hearing the complainant sought to put in evidence figures from August 1 to November 30, 1958 (CX 683) which were, of course, subject to the same objection as the complainant had urged for the preceding year (Tr. 5832).

These individual short periods should not be considered as showing any definite trend of share of market. As indicated in many of the exhibits, market share of a brand fluctuates up and down dependent on price increases or decreases, bookkeeping, timing of advertising and special promotions and merchandising programs, etc. For example, the total February-March sales of liquid bleach from 1953 to 1958, were down from the preceding bi-monthly period in five

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of the years and up in one and the percentage changes ranged from -3.2% to +.8% (CX 694).

For individual brands the variations are even more marked. For instance, in the case of Purex figures for 1958, shown on this same Exhibit, CX 694, in two of the six reporting periods, Purex sales were better proportionally than total sales throughout the United States. In one instance the changes in Purex sales and total sales were the same. In three the Purex brand sales were lower proportionately than total sales.

With the variations which occur for seasonal and other reasons in any given year, it is apparent that either party could select, from the wide range of figures in the record, one or two bi-monthly periods which would seem favorable to that particular party. However, this would establish nothing and any determination of trend should properly be on an annual basis related to a comparable period before and after the acquisition.]

186. In view of Clorox's market share at the time of the acquisition, its increase of 0.3% of one Nielsen point in the year following the acquisition is so small as to be almost *de minimis*. Furthermore, there is no proof that such increase, inconsequential as it is, came about because of, or was attributable to, the acquisition.

[Note: Compare *In the Matter of Pillsbury*, where the substantial increase in share and market position was directly attributable to the acquisition and to the elimination and absorption of an important competitor.

Elsewhere we have referred to the steady increases in Clorox market share in the years prior to the acquisition. In this setting we submit that, even if the increase in market share in the year subsequent to the acquisition had been much larger than it actually was, such fact in the light of the evidence in

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this record, would in no way support any conclusion that such an increase in market share stemmed from or was attributable to the acquisition. There is nothing in this record to indicate that Clorox Chemical, operating entirely independently of Procter, would not have maintained its trend of growth in the liquid bleach business or even enhanced it.]

187. In line with the growth of total sales of liquid bleach in the United States and as indicated by the virtually unchanged market share of Clorox in the 12-month period after the acquisition, the total sales of Clorox through grocery stores increased from \$46,470,000 to \$51,183,000.¹

[Note: As set forth in the table in Proposed Finding 178, the total sales of household liquid bleach increased \$9,145,000 in the 12-month period after the acquisition over the preceding 12-month period. Clorox's total sales increased in roughly the same ratio as is indicated by the fact that its market share remains substantially the same. In other words, Clorox's increase in dollar sales simply reflects the maintenance of its prior position in the expanding liquid bleach business.]

Record support: ¹ RX 94.

188. The market shares of Clorox, set forth in preceding Findings Nos. 184-186, reflect only its share of household liquid bleach moving through grocery stores. Such figures do not purport to reflect Clorox's market share of the household bleach industry as a whole, since they do not include dry bleach or house-to-house sales of liquid bleach or sales through outlets other than grocery stores. Hence, it is obvious that the Clorox market share of the total household bleach industry is less than shown in the Nielsen figures.

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[Note: Complainant has urged in this proceeding that dry bleach is not properly a part of the line of commerce involved. It has ignored the potential competitive effect of dry bleach as a substitute for liquid bleach. Yet the advantages of dry bleach in terms of weight and handling, are such that it could seriously affect the public acceptance of liquid bleach and adversely affect the market shares of liquid bleach producers in the overall bleach industry.]

C. MARKET POSITION OF COMPETING BLEACH PRODUCERS BEFORE AND AFTER ACQUISITION.

1. Market position of Purex

189. Although Purex does not sell household liquid bleach throughout the United States, the Nielsen figures show the total sales of the Purex brand and the share of the total sales of liquid bleach throughout the United States represented by such brand. Such sales and shares for each of the years ending July 31, from 1953 through 1958, are as follows:¹

<i>Year Ending July 31</i>	<i>Purex Dollar Sales (000)</i>	<i>Purex Brand Share of Market</i>	<i>Decline in Share</i>
1953	\$12,706	17.7%	—
1954	12,633	16.8%	0.9%
1955	13,503	16.4%	0.4%
1956	14,566	16.3%	0.1%
1957	15,425	16.1%	0.2%
1958	16,688	15.9%	0.2%

Record support; ¹ RX 117.

190. As indicated in the preceding Finding 189, the increase in the total dollar sales of Purex brand house-

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hold liquid bleach in the 12-month period following the acquisition, over the preceding 12-month period, was \$1,263,000.¹ As also indicated in the preceding finding, this was the largest increase in sales enjoyed by the Purex brand for any 12-month period from August 1, 1953 to July 31, 1958. In addition, this increase does not represent the total increase in the Purex liquid bleach business since it does not reflect the growing business of Purex Corporation, Ltd. in the private label field.

[Note: Even complainant's Exhibit 692 shows the same gain as shown in RX 117 and it also shows that for the 12 months after the acquisition, Purex brand sales were 8.2% above those in the 12-month period immediately prior to the acquisition.

It will also appear from RX 94, RX 117 and CX 692 that over the years prior to the acquisition, the Purex brand share of market had been declining in relation to the share for Clorox and that after the acquisition this decline was smaller than at any previous time. These figures show that the market share trend of the Purex brand as compared with Clorox was more favorable to Purex after the acquisition than it was before.]

Record support: ¹ RX 120.

191. As also shown by figures in preceding Finding 189, the market share of the Purex brand had steadily declined in each of the 12-month periods prior to the acquisition. In the year immediately following the acquisition the decline in the Purex brand share was the same as in the year immediately preceding the acquisition (i.e. 0.2%), and except for the year ending July 31, 1956, was the smallest decline in market share since 1953.

[Note: The figures heretofore referred to do not, of course, take into account any increase in the Purex

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(market share resulting from its acquisition of Fleecy White or the increase in the Fleecy White market share in the 12-month period subsequent to the acquisition. There is evidence, however, that the combined market share of the Purex brand and Fleecy White was the same for the two-month reporting period immediately prior to the acquisition as it was for the last bi-monthly period for which figures were available at the close of the hearings (RX 119).]

192. While there are no figures in evidence from which the Purex brand share in its various areas of distribution can be compared with the Clorox share in such areas for annual periods antedating the acquisition, there is evidence as to the respective shares of such brands for the period from October-November, 1956 to October-November, 1958.¹ These figures show that as of October-November, 1958, the Purex brand share of household liquid bleach in such areas was 31.8% as compared to the Clorox share of 39.4%. The Purex market share figures, however, do not include the Purex company's sales of private label bleach. To the extent of such sales, the Nielsen figures necessarily understate Purex Corporation, Ltd.'s share of the entire household liquid bleach business.²

Record support: ¹ CX 672. While the figures shown on CX 672 are too fragmentary to permit any conclusions as to trends in market shares, they do indicate that the respective shares of Purex and Clorox declined, while the shares of all other bleaches sold in the area increased.

² Nickelson (Tr. 4712-13). The Purex private label bleach figures were not introduced into evidence, and were not produced, although requested by respondent. It should also be noted that included within the Purex distribution area shown on CX 672 are marginal areas of distribution (Tr. 2000-1) where the share of Purex is necessarily less than in a fully-covered area. If an adjustment were made for such areas it would increase further the overall Purex Corporation share of the market.

(record support continued next page)

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Record support: ² (continued)

In addition, sales of Fleecy White were not included in the market share reported for Purex. All of these factors taken together might well eliminate and would reduce any difference between the market share of Clorox and Purex Corporation in the Purex distribution territory. The complainant did not offer proof sufficient to show that there is any material difference between the share of market of the two companies in the territory which they both cover.

193. The sales and market share of Purex brand of liquid bleach, as set forth in preceding Findings, were attained despite the fact that Purex Corporation, Ltd. was dividing its sales efforts in the bleach industry by reason of its exploitation and promotion of its dry bleach—Beads O'Bleach.¹

[Note: The emphasis which Purex, Ltd. has placed upon the marketing of its dry bleach is illustrated by the cover page of its 1958 Annual Report (RX 114). This pictorially features Beads O'Bleach and no other product.]

Record support: ¹ Stoneman, Tr. 1971:

194. There is no proof that any changes in the sales or market share of the Purex brand liquid bleach, whether calculated in relation to total sales of liquid bleach throughout the United States, or sales in the various areas in which the Purex brand is distributed were caused or affected, or probably will be affected, by the acquisition.

2. *Market position of other competing bleach producers.*

195. Since no producers of household liquid bleach other than Clorox sell their products in all sections of the United States, the share of any such producer of the total sales of liquid bleach throughout the United States is unrealistic

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as the basis of any comparison with the national market share of Clorox and cannot properly be used for such purpose. In addition, except in the case of Purex,¹ the complainant, which has the burden of proof, failed to offer any evidence which would permit a valid comparison of market shares between Clorox and any other liquid bleach producer in the entire area or areas in which such producer and Clorox compete.

Record support: ¹ CX 672; see Proposed Finding 192.

196. While the Nielsen figures contain no figures on an annual basis as to the volume of sales of individual producers (other than Clorox and Purex), such sales and share can be determined on a collective basis from the Nielsen figures.¹ Such figures show that the sales of liquid bleach producers other than Clorox and Purex for the 12-month period subsequent to the acquisition increased \$3,169,000 over the preceding 12-month period.²

Record support: ¹ The Nielsen figures respecting market shares of total sales of liquid bleach throughout the United States contain no breakdown of shares of individual bleach brands (other than Purex) which would permit any comparison with Clorox for the 12-month periods prior and subsequent to the acquisition.

² RX 94; RX 117. The increases in the dollar sales of Clorox and Purex have been deducted from the total dollar sales increase to arrive at the increase in sales of all bleaches other than those two brands.

197. In the 12-month period subsequent to the acquisition, the collective market share of all producers of household liquid bleach (other than Clorox and Purex) was substantially identical with the market share of such producers in the 12 months prior to the acquisition. Such

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market share declined 0.1% which is so small as to be *de minimis*.¹

[Note: Since the combined all-other brands of liquid household bleaches, other than Clorox and Purex, virtually maintained their competitive position for the full year after the acquisition, it is obvious that they have been unaffected by any competitive pressure against them.]

Record support: ¹ The decline of 0.1% is apparent from RX 94 and RX 117 which show that the Clorox share increased 0.3% and the Purex share declined 0.2%, thus necessarily indicating a decline of only 0.1% for all other producers.

198. Even if the minute fractional decline in the collective market share of bleach brands, other than Clorox and Purex, had any significance, there is no evidence in this record from which the trend of market share of any particular brand in the United States can be computed for comparable 12-month periods.¹ The evidence shows that the number of brands of household liquid bleach for which share of market is specifically computed, varies with the different bi-monthly reporting periods of the Nielsen Food Index,² and a witness for the complainant testified that it was impossible to compute market shares for brands other than Clorox and Purex prior to April-May, 1957.³

Record support: ¹ CX 672, applicable only to the Purex distribution area, shows figures for all other liquid bleach brands from and after October-November, 1956 and shows that the Nielsen percentage for this group for the last period is now higher than it has been at any time in past two years.

² CX 325, CX 334, CX 335 and RX 85. Nielsen Food Index reports sales of only those brands specifically ordered by a client (Tr. 4816-7). Whether or not a brand is audited and reported bears no relationship to the importance of such brand in its own marketing area.

³ Smith, Tr. 5859-60. See Finding No. 201 *infra*.

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199. Such Nielsen statistics as are contained in the record bearing upon the market share of any competitive brand of bleach reflect the regional characteristics of the industry and the varying market shares of liquid bleach producers from time to time.¹

[Note: For example, in the Chicago Metropolitan area where Linco is the largest selling brand of liquid bleach (Tr. 2181), the Clorox share is very small; in the Pacific and Southwest territories where Purex competes with Clorox in the entire Nielsen reporting area, Purex is ahead of Clorox in one area and behind in the other; and in the New England territory where no competitor competes throughout the entire reporting area, Clorox has a higher share of market than the national average.

The varying share of market of any brand, including Clorox, for any particular period shows the lack of probative value in considering arbitrary beginning and closing periods for determining trend and the necessity for looking at periods in which seasonal fluctuations are eliminated. Depending on the selection of the area and the time period, almost any superficial conclusion can be reached. For example, CX 682 shows bi-monthly Nielsen reporting periods from December-January 1957 to October-November 1958 in the Nielsen reporting territories. In five of the territories, the Clorox share went up during this period; in three it went down; and in one it remained the same.]

Record support: ¹ CX 682.

200. Both Nielsen statistics and the testimony of certain competing bleach producers, called as witnesses by the complainant, establish the significant position of their respective brands in the particular areas in which they

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were engaged in business. For example, Linco sells approximately 45-50% of the liquid bleach marketed in the Chicago area.¹ Clo-White is the principal factor in Savannah.² Hilex is much stronger than Clorox in Minneapolis.³ Roman Cleanser has the largest market share in Detroit.⁴ In the entire Pacific territory, as reported by the Nielsen Food Index, Purex has a higher market share than Clorox.⁵

Record support: ¹ Hahn, Tr. 2181; Bellingall, Tr. 5180. In addition, Linco produces a substantial volume of private label bleach which, when included in its total sales, would materially increase the company's share of market (CX 464).

² Kunin, Tr. 2404.

³ Bellingall, Tr. 5180.

⁴ Riccardi, Tr. 3075-76.

⁵ CX 681; CX 682. CX 695 was offered to show the Purex shares in three divisions of the Nielsen Pacific territory. In two of them Purex had a higher share than Clorox, in one of them Clorox had a higher share than Purex, but in the total area Purex had a higher share. For the last bi-monthly reporting period, the Clorox share of market varied from 33.0% to 45.8%, and the Purex brand share varied from 26.8% to 55.1% (CX 695). This again demonstrates the highly competitive nature of the liquid bleach business on a local area basis.

201. Although the competing bleach producers, called as witnesses by the complainant, testified some months after the acquisition, no witness testified that he had sustained any loss in sales or market position or customers as a result of the acquisition. Moreover, although the complainant had the burden of establishing any loss in sales by any competitive bleach producer, no Nielsen or other statistical evidence was introduced to show that in the 12-months period following the acquisition the sales of any such bleach producer had decreased in comparison with sales in a comparable period prior to the acquisition.

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[Note: There are certain exhibits relating to less representative annual periods (e.g., CX 694) and permitting comparisons for less than a 12-months period (e.g., CX 693) but none of the figures on such exhibits either shows or indicates any decrease in the total liquid bleach sales for any liquid bleach producer during any period after the acquisition, except in the case of Roman Cleanser. In that situation, Mr. Riccardi testified that the depressed labor market in Detroit had affected the volume of his business (Tr. 3065). The Hearing Examiner may also take judicial notice (see, for example, TIME MAGAZINE, March 23, 1959, p. 19) that such depressed labor market still existed in the Roman Cleanser sales area as of that time.

There are also in the record exhibits prepared by bleach producer witnesses appearing for complainant which purport to show their sales figures (CX 443, 464, 472, 483, 491, 496, 503, 504, 510A-B, 519A-B, 530). Some of these exhibits purport to show net sales (e.g., CX 472-Hood Chemical Co.); some gross sales (e.g., CX 519-Roman Cleanser Co.); others, both net and gross sales (e.g., CX 510-Gardiner Manufacturing Company, Inc.); some include sales of private label bleach (e.g., CX 472-Hood Chemical Co.) and in other such sales were not included (e.g., CX 443-Purex Corporation, Ltd.); and one exhibit purporting to show sales figures actually represents a flat percentage of total sales of all products sold including non-bleach products (CX 483-Rose-lux Chemical Company, Inc., Tr. 2442).

None of these exhibits, however, shows sales figures beyond December, 1957, and even the figures shown are not broken down so that any reasonable comparison for like periods can be made of sales before and after the acquisition. Nonetheless, in every one of these instances the dollar sales figures submitted by these witnesses were higher in 1957 than in any preceding year shown.

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No dollar sales figures for Vano liquid bleach were offered; however, the case sales for that brand were lower in 1957 than in 1956. This merely represented a continuation of the downward trend that began in 1952, and did not and could not have been caused by the acquisition (CX 530). The producer of Vano liquid bleach, Chemicals, Inc., was acquired by B. T. Babbitt, Inc. in 1956 (CX 535). The production and distribution of liquid bleach at the time of that acquisition was of such little importance or interest to B. T. Babbitt, Inc., that in the Annual Report for 1956, no mention was made of the fact that Chemicals, Inc. even manufactured liquid bleach, although the acquisition and other products acquired were fully discussed (CX 535).

The case sales for Sunlight Chemical Corp. in 1957 were lower than in 1952 and 1953 but were higher than those in 1954, 1955 and 1956 (CX 496). The witness for Sunlight explained that five years previously he had sold his private label business to Prescott (Tr. 2724).

Despite the fact that complainant did not close the case-in-chief until August, 1958 (Tr. 3839) and was permitted to present Nielsen figures for as late as October-November, 1958 (See, for example, Tr. 5661), more than a year after the acquisition, no evidence of sales of competing liquid bleach producers, except that relating to Purex and Roman Cleanser referred to previously, was offered which would permit a reasonable comparison of such sales before and after the acquisition. In the absence of any such evidence it must be assumed that the growth trend for the individual bleach producers continued after the acquisition.]

202. There was no testimony that any competing bleach producer had lost a single grocery store account since the acquisition.

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[Note: The Hearing Examiner suggested that information as to this subject be elicited by complainant (Tr. 2593-94). Despite this suggestion, complainant did not interrogate any of its bleach producer witnesses concerning it. We submit that it can properly be assumed that had such questions been propounded, the answers would have been that no accounts had been lost.]

203. There is no proof that any change in the sales or market share of any competing bleach producer, whether calculated in relation to total sales of liquid bleach throughout the United States, or sales in the particular area in which it markets its bleach, was caused or affected or probably will be affected, by the acquisition.

204. In summary, if the effect of the acquisition on competition is to be determined by the probable consequences thereof with respect to the larger bleach producers,¹ the record shows that as to such producers, the dollar sales and market shares of none of them have been affected by the acquisition. In fact, Purex, the largest competitor of Clorox, enjoyed in the year following the acquisition the largest dollar increase in sales and, except for 1956, the smallest decline in market share since 1953.² With respect to other large bleach producers, they have, on the whole, enjoyed a substantial increase in dollar sales and no decline in market share.

Record support: ¹ See, for example, the Hearing Examiner's remarks at Tr. 5683-4 and 5881-82.
² See Findings 189 through 191.

205. If the criterion of legality is the effect of the acquisition on small as well as large bleach producers, the uncontradicted evidence shows that the dollar sales of "all

Proposed Findings of Fact

other" bleach producers (other than Clorox and Purex) has since the acquisition reached the highest level in history, and the collective market share of such producers in the year following the acquisition has remained constant.¹

Record support: ¹ See Findings 196, 197 and 202.

D. THERE IS NO PROOF OF THE PROBABILITY OF ANY MATERIAL CHANGE IN MARKET POSITIONS IN THE LIQUID BLEACH BUSINESS BY REASON OF THE ACQUISITION.

206. The Nielsen data which is in evidence establishes that the trends which were developing in the bleach industry were not reversed after the acquisition of Clorox Chemical by Procter. In fact, Nielsen data show a continuation of the expansion of the household liquid bleach market moving through grocery stores with a competitive gain for Clorox for the year after the acquisition which was less than in any previous year for which records are available. Conversely, the competitive loss of the Purex brand together with the collective loss of all other brands was less in the 12-month period after the acquisition than for any 12-month period prior to the acquisition.

Furthermore, the uncontradicted testimony is that since the acquisition the management of Clorox has aggressively utilized all advertising, promotional and sales efforts which its management deemed necessary to promote and sell the Clorox brand.¹

[Note: Any disregard of this evidence or of the objective statistical evidence would be to decide the issues here by clairvoyance and nothing else. We further submit that the significant statistics can not

Record support: ¹ Trimpe, Tr. 4415; Bellingall, Tr. 5121-22. In addition, the undisputed testimony is that there has been no "holding back" in such activities since the acquisition.

Proposed Findings of Fact

be offset by the bare and unsupported guesses of a few of Clorox's competitors. (See Proposed Findings in Section VII *supra*).]

IX. Conclusions

207. Complainant has the burden of establishing by reliable, probative and substantial evidence, that the probable effect of the acquisition by Procter of Clorox Chemical may be substantially to lessen competition or to tend to create a monopoly. Complainant also has the burden of defining and proving the relevant line of commerce and the section of the country in which the acquisition would have the proscribed effects.

208. Prior to the acquisition Clorox Chemical had achieved a substantial position in the household liquid bleach industry and had, in each year from 1952 to the time of the acquisition, steadily increased its sales and improved its market share position. The preacquisition position of Clorox Chemical is immaterial in determining whether any lessening of competition or tendency to monopoly may result from the acquisition. The prohibited effects of Section 7 of the Clayton Act must be found to be reasonably probable because of and as a result of the acquisition.

209. Prior to the acquisition Procter did not compete in the household liquid bleach market nor is there any proof that it sold any products to or bought any products from any producer of household liquid bleach. Procter's acquisition of Clorox Chemical thus did not result in (1) the elimination in whole or in part of the competitive activity of an enterprise engaged in the production and sale of household liquid bleach, or (2) the establishment of any

Proposed Findings of Fact

relationship between the two companies which deprived any seller of a fair opportunity for sales to Clorox Chemical or Procter or which deprived any buyer of a fair opportunity to compete for any purchases from Clorox Chemical or Procter.

210. In the absence of proof that Clorox Chemical gained any substantial competitive advantage as a result of the acquisition, no lessening of competition nor tendency to create a monopoly can be ascribed to the size of Procter or its demonstrated ability in the production and marketing of household products other than household liquid bleach.

211. Plaintiff has failed to prove that the relevant line of commerce is the household liquid bleach industry as distinguished from the entire household bleach industry (liquid and dry). Complainant has failed to prove that the national market (i.e. the entire United States) is the proper relevant market in this proceeding. Complainant has also failed to prove the area or extent of or competitive conditions within any regional or local market in which the effect of the acquisition should be measured.

212. Even if it be assumed that the household liquid bleach industry is the relevant line of commerce and that the national market is the relevant market, complainant has failed to prove that there are any advantages or factors resulting from the acquisition which might, with reasonable probability, result in any lessening of competition or tendency to create a monopoly in the manufacture, distribution or marketing of household liquid bleach.

213. Complainant has failed to prove that the acquisition has had or that there is any reasonable probability that it will have any effect upon competitors or competition in the household liquid bleach industry.

Proposed Findings of Fact

214. The acquisition of Clorox Chemical by Procter does not violate the provisions of Section 7 of the Clayton Act and the complaint should be dismissed.

Respectfully submitted,

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Of Counsel

Dated: May 8, 1959

[Caption Omitted]

ORDER CLOSING CASE

(Filed June 17, 1960)

The reception of evidence in this matter having been concluded and all procedural steps having been complied with,

IT IS ORDERED that all proceedings before the Hearing Examiner in this matter be, and they hereby are, closed.

/s/ EVERETT F. HAYCRAFT
EVERETT F. HAYCRAFT,

Hearing Examiner.

June 17, 1960.

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[Caption Omitted]
INITIAL DECISION
 (Filed June 17, 1960)

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Initial Decision

[Caption Omitted]

INITIAL DECISION

(Filed June 17, 1960)

Everett F. Haycraft, Hearing Examiner.

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PRELIMINARY STATEMENT**A. THE PLEADINGS AND PROCEEDINGS.**

The Commission, on September 30, 1957, issued a complaint against The Procter & Gamble Company, an Ohio corporation, sometimes hereinafter referred to as P & G, with its principal office and place of business located in Cincinnati, Ohio, charging it with violation of Section 7 of the Clayton Act, as amended December 29, 1950, through the acquisition on August 1, 1957, of the assets, trademarks, business and goodwill of the Clorox Chemical Company, a Delaware corporation, sometimes hereinafter referred to as Clorox Chemical, with its principal office and place of business located in Oakland, California.

Specifically, the complaint alleges that the effect of the acquisition of the assets and business of Clorox Chemical, "may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of household liquid bleaches in the United States and in each of them."

Preliminary Statement

More specifically it is alleged that the effect of the acquisition was the actual or potential lessening of competition and a tendency to create a monopoly in the following ways, among others:

1. In the production and sale of household liquid bleach.
2. The elimination of Clorox Chemical as an independent, competitive factor in the household liquid bleach industry.
3. Household liquid bleach producers may be unable to compete with the respondent due to one or more of the following:

- a. Respondent's market position.
- b. Respondent's financial and economic strength.
- c. Respondent's advertising ability and experience.
- d. Respondent's merchandising and promotional ability and experience.
- e. Respondent's 'full-line' of cleansing and laundry products.
- f. Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space.
- g. Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability."

4. Enhancement of respondent's competitive position in the production and sale of household liquid bleach to the detriment of actual and potential competition.

5. The industry-wide concentration of the production and sale of household liquid bleach may be increased.

6. The respondent is given the facilities, the market position and the "dominant ability" to monopolize, or tend to monopolize, the household liquid bleach market.

In its answer, filed November 4, 1957, respondent denied all charges of illegality contained in the complaint.

Preliminary Statement

The taking of evidence commenced in Cincinnati, Ohio, on December 16, 1957. Additional hearings were held in San Francisco, Los Angeles, Chicago, Philadelphia, New York, Boston, Buffalo, Detroit, and Washington, D. C., at which testimony was taken in support of the allegations of the complaint. Counsel in support of the complaint closed their case in chief on August 26, 1958.

Counsel for respondent presented evidence in opposition to the allegations of the complaint at hearings held in Washington, D. C., on November 17-26, 1958, and January 5-9, 1959.

Rebuttal testimony was received in Washington, D. C., commencing January 26, 1959. The hearings were concluded on February 12, 1959, when each party stipulated that its case was closed. Proposed findings were filed by the opposing parties in May 1959, and oral argument was held on June 16, 1959. Numerous briefs have been filed both before and after the oral argument, the last one having been filed in November 1959. The record consists of approximately 6,000 pages of transcript and several hundred exhibits, many of which consist of several pages.

B. STATEMENT OF THE ISSUES AND OPINION.

Section 7 of the Clayton Act, as amended December 29, 1950, provides in part as follows:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of any such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Preliminary Statement

The House Report accompanying the bill amending Section 7, as above, stated:

"Under (Section 7) a merger or acquisition will be unlawful if it may have the effect of either (a) substantially lessening competition, or (b) tending to create a monopoly. These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act. Thus, it would be unnecessary for the Government to speculate as to what is in the 'back of the minds' of those who promote a merger; or to prove that the acquiring firm had engaged in actions which are considered unethical or predatory; or to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitors or fix prices."¹

It will be noted from the foregoing that among the first things to be determined in this case, and the necessary issues, are:

1. The Statutory "Line of Commerce" involved in the transaction.
2. The Statutory "Section of the Country" involved in the transaction.
3. The effect on competition in such "Line of Commerce" and/or such "Section of the Country".
 - a. Does the acquisition tend to substantially lessen competition, or
 - b. Tend to create a monopoly in the line of commerce or section of the country where the respondent and the acquired corporation are engaged in business.

¹ H. R. Report No. 1191 of 81st Congress, 1st Session, Page 8.

Preliminary Statement

In the Senate report accompanying the amendment to Section 7 of the Clayton Act in 1950, the following language is found:

"What constitutes a section (of the country) will vary with the *nature of the product*. * Owing to the difference in size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition was based on miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product such as milk, and

... "Hence, an acquisition is not to be interpreted merely in terms of either its effect on competition or its tendency to create a monopoly '*in the Nation as a whole*'. * The act is to be violated if, as a result of the acquisition, there would be a substantial lessening of competition or a tendency to create a monopoly in any section of the country."¹

Another issue is whether or not the acquisition involved in this case, a so-called conglomerate merger, comes within the language of the statute, since there was no competition between P & G and Clorox Chemical prior to the acquisition. The House Report (*supra*) states as follows:

"Because Section 7, as passed in 1914, prohibited, among other things, acquisitions which substantially lessened competition between the acquiring and acquired firms, it has been thought by some that this legislation applies only to the so-called horizontal mergers. But in the proposed bill, as has been pointed

¹ Senate Report 1775, 81st Congress, 2nd Session, Pages 5 and 6.

* Emphasis supplied.

Preliminary Statement

out above, the test of the effect on competition between the acquiring and the acquired firm has been eliminated. One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors. *But there is a second reason, which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly.*" * *

Consideration has been given to the proposed findings and all the reliable probative and substantial evidence in the record upon all material issues of fact, law or discretion. Each of those proposed findings which has been accepted, has been, in substance, incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected.

The examiner is of the opinion that the material allegations of the complaint have been proven by substantial and reliable evidence and that the Commission should take remedial action in the premises. Appropriate Findings as to the Facts, Conclusions and Order of Divestiture are hereinafter set forth.

FINDINGS AS TO THE FACTS

I. DESCRIPTION OF THE RESPONDENT AND THE INDUSTRIES IN WHICH IT WAS ENGAGED IN 1957.

Respondent P & G and various of its subsidiaries in 1957 were engaged principally in the manufacture and sale of soaps, synthetic detergents and cleansers. It also manufactured and sold some food products, (including meat food products, paper products, shampoos, dentifrices and

* Ibid, Page 11.

* Emphasis supplied.

Findings As to the Facts

home permanents. P & G was, and now is, the largest producer in the United States of soap and synthetic detergent products, and one of the major producers in its other principal product fields. The more important consumer household brands manufactured by P & G and its subsidiaries are sold to retail and wholesale grocery and drug outlets, department stores and variety stores. P & G was, and now is, one of the leading national advertisers in the United States and expends large sums of money in advertising and promoting many of its products in the household soap, detergent, food and toilet goods fields. P & G's overall expenditures for advertising in the United States of approximately thirty-five products manufactured by it and sold under its brand names were somewhat in excess of \$79,000,000 for its fiscal year ended June 30, 1957.

As of June 30, 1957, P & G had total assets of \$688,272,623 and total capital and retained earnings of \$462,097,281. For the fiscal year 1957, consolidated net sales amounted to \$1,156,389,726, and consolidated net earnings were \$67,807,376.

As of June 30, 1958, P & G had total assets of \$755,991,432 and total capital and retained earnings of \$526,476,919. For the fiscal year 1958, consolidated net sales amounted to \$1,295,163,269, and consolidated net earnings were \$73,196,618.

Since 1946 P & G's net sales have increased more than 300%, and total assets have increased approximately 400%. A large percentage of this growth is attributable to the development of new products. For instance, it has developed and brought on the market a new detergent, a new deodorant toilet soap bar, two new brands of toothpaste, and an abrasive cleanser, all of which have proved very popular. P & G's president testified that approximately

Findings As to the Facts

70% of P & G's household product volume comes from products not in existence in 1946.

P & G has also grown by acquiring going businesses and, in so doing, entered new fields and diversified its operations. For instance, in August 1955 P & G acquired S. T. Young Foods, Incorporated, which manufactured peanut butter; in August 1956 P & G acquired the Duncan Hines prepared cake mixes from Nebraska Consolidated Mills, Incorporated, of Omaha; and in January 1957 it acquired Charmin Paper Mills, Incorporated, manufacturer of paper products.

The Duncan Hines and Charmin products were added to the P & G list of consumer brands during the fiscal year ended June 30, 1957. In P & G's annual report of 1957 the following statement appears:

"Procter & Gamble's technical knowledge and manufacturing experience fit very well into the development and production of these types of products. In addition, both prepared mixes and paper tissue products are low priced, rapid turn-over, household items sold primarily through grocery, drug and department stores—the type of goods which the company is accustomed to market."

A further explanation is made of such acquisitions in the following language by the P & G Board Chairman:

"Since our recent purchase of the Duncan Hines Cake Mix business, and our interest in the paper products field, it would be natural for any shareholder to ask, 'Why do we go into businesses like cake and other flour and shortening mixes, peanut butter and paper tissues?' Our answer would be simply that we feel *our experience and marketing skill* qualify us carefully to diversify our operations, and that by choosing

Findings As to the Facts

subsidiaries well and applying Procter & Gamble's merchandising methods to related consumer products businesses, we add to the stability and profits of the business." *

The Executive Vice President of P & G at the time of the acquisition of Clorox Chemical, in a press release, stated:

"While this a completely new business for us, taking us for the first time into the marketing of a household bleach and disinfectant, we are thoroughly at home in the field of manufacturing and marketing low priced, rapid turn-over consumer products." *

II. THE CLOROX CHEMICAL COMPANY.

The Clorox Chemical Company was, prior to August 1, 1957, a Delaware Corporation, with its office and principal place of business in Oakland, California, and was engaged in the production and sale of 5¼% sodium hypochlorite liquid bleach and disinfectant under the trade name of "Clorox". At that time, and certainly since 1952, Clorox Chemical was the largest producer of household liquid bleach in the United States. It had thirteen plants for the manufacture and bottling of household liquid bleach, located at Atlanta, Georgia; Boston, Massachusetts; Camden, New Jersey; Charlotte, North Carolina; Chicago, Illinois; Cleveland, Ohio; Houston, Texas; Jersey City, New Jersey; Kansas City, Missouri; Los Angeles, California; Oakland, California; Seattle, Washington, and Tampa, Florida.

Net sales and net income of Clorox Chemical for the fiscal years ending June 30, 1952, through June 30, 1957, were as follows:

* Emphasis supplied.

Findings As to the Facts

<i>Net Sales</i>	<i>Net Income</i>
1952....\$23,625,026	1952.....\$1,255,005
1953....\$27,714,435	1953.....\$1,348,618
1954....\$30,284,650	1954.....\$1,343,511
1955....\$33,874,181	1955.....\$2,041,251
1956....\$36,409,197	1956.....\$2,032,861
1957....\$39,999,114	1957.....\$2,569,166

As of June 30, 1957, Clorox Chemical had total assets of \$12,629,425 and an earned surplus of \$7,127,015.

The foregoing net sales figures represent almost entirely sales of household liquid bleach which, with the exception of a small amount of industrial bleach, has always been Clorox Chemical's only product.

It will be seen from the foregoing table that the net sales of Clorox Chemical reflect a steady, continuous and substantial growth in each of the fiscal years from June 30, 1952, through June 30, 1957.

In each of the years during the period from August 1, 1952, through July 31, 1957, there was also a steady and continuous growth in Clorox Chemical's market share of all household liquid bleach sold in the United States through grocery stores. Such market shares were as follows:

<i>Year Ending July 31</i>	<i>Clorox Brand Share</i>
1953	45.3%
1954	46.4%
1955	47.1%
1956	47.7%
1957	48.4%

Clorox Chemical sold its product through approximately 80 distributors, acting as principals, to the grocery trade—shipments being made direct to the retail customer as

Findings As to the Facts

well as to the distributor, with the freight paid by Clorox Chemical.

Clorox Chemical's success in the household liquid bleach industry had been achieved through extensive national advertising which had made the name Clorox well known and accepted in American households as a quality product at a reasonable price.

The record indicates that Clorox Chemical was generally considered the price leader in the household liquid bleach industry. While a few brands, such as Purex, Linco, Prescott, 101, Hilex, and Roman Cleanser, sold at substantially the same premium price as Clorox, most of the brands manufactured by regional manufacturers sold for less than Clorox. Most private label and local brands generally sold for even lower prices. There is evidence that in a few isolated regional situations, certain competitive bleaches have been sold at a higher price than Clorox.

Clorox Chemical spent approximately \$1,750,000 for newspaper advertising, \$560,000 for magazine advertising, \$1,150,000 for television, \$113,000 for radio, and \$145,000 for billboard advertising during the fiscal year ended June 30, 1957. It began to use TV spot advertising in July 1956, which was intended to add "extra impact to the tremendous selling support provided by Clorox national advertising."

During the period 1952 through July 31, 1957, Clorox Chemical had utilized no so-called consumer promotional devices or methods, such as the distribution of price-off coupons, free samples, premiums, contests or tie-in sales, although many of its competitors had utilized some or all of these devices.

Clorox Chemical commenced to use what is known as special spring and fall housecleaning campaigns in 1956. These campaigns were directed primarily to the grocer.

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and offered nothing special to the consumer. These campaigns lasted approximately six weeks, the spring campaign beginning in March, and the fall campaign in September. They were continued during 1957, the fall campaign being announced in a letter to the trade dated July 31, 1957, just prior to its acquisition by P & G.

III. THE ACQUISITION OF CLOROX CHEMICAL.

Respondent considered entering the household liquid bleach market by purchasing the Clorox Chemical Company approximately two years prior to the date of acquisition. In a confidential study of that market, by employees of respondent P & G in October, 1955, it was reported that liquid bleaches would continue to dominate the market volumewise since they were by far the most economical for the consumer to use. It was believed at that time that the household liquid bleach market would continue to grow for the following reasons:

- "a. 75% of the homes now use a bleach.
- b. Younger women bleach more than do older women.
- c. Automatic washing machine homes use more bleach than do conventional washing machine homes."

It was estimated in this report that the total household liquid bleach market in 1955 amounted to about 44,000,000 (3-gallon case) cases, and the market was divided as follows:

"Clorox (National)	44%
Purex (Sectional)	16%
All others	40%"

This report, which was prepared by a man in the promotional department of respondent, recommended that the company should acquire the Clorox business rather than

Findings As to the Facts

try to enter the market by introducing a new brand, or by trying to expand a sectional brand. This was because it was felt that the latter course would require "a very heavy investment" to achieve a major volume in the field. It was recommended that:

"taking over the Clorox business, however, could be a way of achieving a dominant position in the liquid bleach market quickly which would pay out reasonably well."

The report contained a history of the net sales and earnings of Clorox Chemical with the following comment:

"We understand that Clorox sells through a broker-jobber setup, and that while they are #1 nationally, there are many important markets where their share of the bleach market is quite low. We feel that with our sales, distribution and manufacturing setup, we could effect a number of savings that could possibly increase the net profit of their business considerably—say to a net profit of \$3,000,000 on net sales of \$33,000,000."

In a later report by another member of the promotional department of respondent P & G, dated February 28, 1957, it was definitely recommended that P & G purchase the Clorox Chemical Company at a price of approximately \$30,000,000 of P & G stock. Among the reasons for recommending the purchase were the following:

First, the total bleach market was then a "large and expanding one." Liquid bleaches account for approximately 95% of the total volume, and it was believed that the bleach market would continue to grow for the same reasons assigned in the previous 1955 report hereinbefore mentioned.

Findings As to the Facts

Second, Clorox was the nation's dominant bleach brand, with a total market share, reported by Neilson, in excess of 42%, or approximately half of the total household liquid bleach market.

Third, it was unlikely that the growth of dry bleaches would cut into the liquid bleach volume for many years to come.

Other factors taken into consideration were as follows:

"We are advised that Clorox spent \$2,660,000 in the last half of 1956 for advertising, or at the rate of \$5,320,000 a year. We believe that *P & G advertising philosophies and economies* applied to an advertising expenditure of this size can be expected to further advance the Clorox business.*

"It is conceivable that the profitability of the Clorox business may be improved. Recognizing that Procter & Gamble overhead charges, if applied to the Clorox P & L statement, might appear to reduce the profitability or at least to off-set any economies under P & G operation, there remains such possibilities as a 5¢ to 10¢ increase in the price per case (using Clorox 12 quart case as a base), which could conceivably be accomplished without an increase in the retail price, thereby expanding profit.

"We may be able to derive additional value from the Clorox name for other new and related products, which may not perhaps be measurable in exact dollars, but should nevertheless be considered a value returned on the investment."

Pursuant to an agreement dated May 28, 1957, between Clorox Chemical and P & G, Clorox Chemical agreed to exchange and transfer substantially all of its assets and business as a going concern to P & G on the terms, conditions

* Emphasis supplied.

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and provisions set forth in said agreement, which provided, among other things, that the closing of such exchange and transfer, subject to prior approval by Clorox Chemical stockholders, would be August 1, 1957.

To implement the transaction, P & G caused a wholly owned subsidiary named The Clorox Company to be incorporated under the laws of the State of Ohio. On August 1, 1957, this subsidiary, pursuant to the plan of reorganization set forth in the said agreement, exchanged 639,578 shares of P & G's fully paid and non-assessable two-dollar par value common stock (about 3.1% of the issued and outstanding stock) for substantially all of the assets and business of Clorox Chemical as a going concern. Clorox Chemical was then dissolved and the P & G stock received by it was distributed among Clorox Chemical's stockholders. The market value of the P & G stock exchanged was approximately \$30,000,000.

IV. HOUSEHOLD LIQUID BLEACH IS THE LINE OF COMMERCE IN THIS PROCEEDING.

The product involved in this case is household liquid bleach, which quite uniformly consists of $5\frac{1}{4}\%$ sodium hypochlorite solution with $94\frac{3}{4}\%$ water. It is either manufactured from basic chemicals (chlorine and caustic soda) or it is converted by the producer from bleach concentrate by the addition of water.

Household liquid bleach is used by the housewife principally in the laundry as an adjunct to soaps and detergents to bleach cottons and fine fabrics. It is also used extensively as a germicide, to disinfect garbage cans, toilets, kitchen sinks, etc.

It is sold principally through grocery stores, in various sized glass containers, including pint, quart, half gallon and gallon bottles, packed in cases as follows: 24 pints,

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12 quarts, 6 half gallons, and 4 gallons to a case, respectively.

It is contended by the respondent that the line of commerce involved in this proceeding should include dry bleach as well as liquid bleach, asserting that approximately 10% of the total household bleach market consists of dry bleach.

Dry bleach is not competitive with liquid bleach because, among other reasons, it has differing functional uses. Liquid bleaches are quicker and more thorough than dry bleaches, and they are considered more in the heavy duty category, while dry bleaches are in the light duty area. In addition, dry bleach is more expensive to use, is much less effective than liquid bleach for laundry purposes, and accounts for only about 5% of all laundry functions.

Clorox Chemical did not manufacture dry bleach, and the evidence indicates that dry bleach will never materially cut into the liquid bleach market, or ever replace liquid bleach in the home.

It is, therefore, found that the line of commerce in this case is household liquid bleach.

V. THE SECTIONS OF THE COUNTRY AND COMPETITORS IN EACH SECTION.

A. *The Sections of the Country Involved Herein.*

There is a national market for household liquid bleach in the sense that it is universally sold throughout the United States in grocery and drug stores. However, this national market is made up of a series of regional and local markets, the geographical confines of which cannot be fixed with any exactitude. There are in the household liquid bleach industry a substantial number of small producers which are located and sell in various local or regional areas. The weight of household liquid bleach, packed

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in cases of glass containers for shipment, results in high freight costs, and necessarily restricts the region served by any one production facility. In the main, each producer markets its products in the region in which it has manufacturing facilities, and which it considers can be economically served by such facilities. In consequence, different competitive factors and conditions are to be found to some degree in each regional market.

Clorox Chemical was the only household liquid bleach manufacturer which sold its product throughout the United States. Purex Ltd., the second largest household liquid bleach producer, marketed its brand in areas of the United States containing approximately 48% of the population at the time of the acquisition of Clorox Chemical by P & G. In October 1958, Purex acquired the plants of John Buhl Products Company, a subsidiary of Sterling Drug, Inc., manufacturing and selling a brand of household liquid bleach known as "Fleecy-White", and, as a result, Purex now markets household liquid bleach in areas of the United States containing approximately 64% of the population. With the possible exception of one or two producers, all of the other members of the industry sold only in smaller regional or local areas.

In all but two of those regional areas, Clorox Chemical, prior to the acquisition by P & G, was a strong competitive factor. However, in two of the regional areas one of the competitive manufacturers occupied a market position comparable to that of Clorox Chemical in the sale of household liquid bleach.

B. The Principal Competitors in each Section.

There is some conflicting testimony as to the actual number of household liquid bleach manufacturers in the United States. It is estimated by the president of respond-

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ent that there are between 100 and 200 such liquid bleach manufacturers. The president of Purex estimated there were approximately 40 to 50 such manufacturers who sell their products under their own label to grocery stores in competition with Clorox liquid bleach. The December 1955 edition of the Thomas Register of American Manufacturers contains the names of 20 companies known as liquid bleach manufacturers that were competitors of Clorox Chemical.

The following household liquid bleach manufacturers were the principal competitors of Clorox Chemical at the time of the acquisition:

1. *Purex Chemical Company*, hereinbefore mentioned, which had the largest distribution of household liquid bleach of any manufacturer except Clorox Chemical, sold its said product to customers in areas west of the Mississippi River and south of the Ohio River, plus portions of Wisconsin, Southern Illinois, and Southern Indiana. It did not sell in Pennsylvania, West Virginia, Virginia, the Carolinas, or Southern Florida. Since its acquisition of the John Buhl Products Company, it has added to its sales territory most of Virginia, West Virginia, Ohio, North Carolina, and parts of Michigan and Wisconsin.

2. *Roman Cleanser Company*, located in Detroit, Michigan, sold its household liquid bleach from its plants in Detroit; Griffin, Georgia; Tampa and Miami, Florida. Deliveries were made to customers located within a radius of about 150 miles of each plant. The territory generally covered by such sales are the States of Michigan, Ohio, part of Pennsylvania, parts of Indiana, Illinois, Georgia, Florida, and very little in Virginia and West Virginia.

3. *Linco Products Corporation*, sold its household liquid bleach principally to customers in and around the City of

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Chicago where its factory is located. Its sales territory also included the States of Illinois, Indiana, Michigan, Wisconsin, and parts of Iowa and Ohio.

4. *The Hood Chemical Company*, with its principal place of business in Ardmore, Pennsylvania, sold its household liquid bleach produced at its plants in South Plainfield, New Jersey; Charlotte, North Carolina; Jacksonville, Florida; and Lisbon, Ohio, to customers in the sales areas surrounding the Cities of Philadelphia and Pittsburgh, Pennsylvania, the States of Florida, North Carolina, and South Carolina.

5. *Rose-Lux Chemical Company*, sold its household liquid bleach under the trade name or brand "Rose-X", manufactured in its factory located in Brooklyn, New York, to customers in the metropolitan area of New York City, including two counties in New Jersey, and one county in Connecticut.

6. *The J. L. Prescott Company*, with its factory located in Passaic, New Jersey, sold its "Dazzle" brand of household liquid bleach to customers in the States of Massachusetts, Connecticut, Rhode Island, and portions of Maine, New Hampshire, New Jersey, New York, Pennsylvania, and Maryland.

7. *The Savol Bleach Company*, from its factory in East Hartford, Connecticut, sold its household liquid bleach to customers located within a radius of 35 miles around Hartford.

8. *The Gardiner Manufacturing Company* sold its household liquid bleach "101" brand from its plant located in Buffalo, New York, to customers in western New York and western Pennsylvania, which included Erie and Bradford, Pennsylvania, Olean, Rochester, and Niagara Falls, New York, and points between those areas.

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9. *The John Buhl Products Company*, hereinbefore mentioned, sold its "Fleecy-White" brand of household liquid bleach to customers in and around the City of Chicago, Illinois, where its factory was located, and in parts of Wisconsin, Michigan, Ohio, Iowa, Illinois, Indiana, West Virginia, Virginia, and North Carolina; and also in some portions of Kentucky, Tennessee, Alabama, Georgia, Texas, and Louisiana.

10. *Jones Chemicals, Incorporated*, sold its household liquid bleach under the trade name "Sunny Sol" from its factory in Caledonia, New York, to chain stores and jobbers in Utica, Binghamton, Norwich, and Albany, New York, and under the same trademark, it sold in bulk to franchised distributors in Buffalo, Rochester, Syracuse, Elmira, New York, and in Erie, Pennsylvania, who in turn sold to retailers in those areas.

11. *Lady's Choice Foods*, a corporation with plants located in San Francisco and Los Angeles, California, manufactured and sold household liquid bleach under the trade names "Saniclor" and "Hypro" to customers throughout the State of California, and portions of Arizona and Nevada.

12. *The No-Worry Chemical Company* manufactured a household liquid bleach at its factory in Newark, New Jersey, and sold it to customers in Essex and Hudson Counties, New Jersey, under the trade name "No Worry Bleach".

13. *B. T. Babbitt, Inc.*, whose principal household product is "Bab-O" also, since 1956 when it acquired Chemicals, Inc., manufactured household liquid bleach at its factory in Oakland, California, under the trade name "Vano", which it sold to customers in the immediate area around San Francisco and Oakland, California.

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14. *The Hylex Liquid Bleach Company*, with its factory located in Minneapolis, Minnesota, sold household liquid bleach to customers in the States of Minnesota, North and South Dakota, and part of Colorado.

15. *The Texize Chemical Company* is listed in Dun & Bradstreet as a manufacturer of household bleach having a financial strength of more than \$1,000,000. It is located in Greenville, South Carolina, and apparently sold its products in that general area, although the record does not contain detailed information with respect to the business of this company. It is of sufficient importance, however, that the Nielsen Food Index includes it in household liquid bleach market studies that have been made.

In addition to the foregoing-named manufacturers, the record contains evidence of another local company in New England; *The Sunlight Chemical Corp.*, of East Providence, Rhode Island, engaged in the manufacture of a line of chemicals for household cleaning and laundry in the home, including a household liquid bleach.

From the foregoing facts, it is found that the sections of the country involved in this case are the United States as a whole, as well as those local and regional markets within the United States where Clorox is sold in substantial competition with one or more other household liquid bleach producers, and as recognized by the A. C. Nielsen Company Marketing Service to be as follows: New England, Metropolitan New York City, Middle Atlantic, East Central, Metropolitan Chicago, West Central, Southeast, Southwest, and Pacific.

VI. CLOROX CHEMICAL'S SHARE OF THE HOUSEHOLD LIQUID BLEACH MARKET IN EACH SECTION AT THE TIME OF THE ACQUISITION.

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The following table sets forth the market share of various brands of household liquid bleach, on a dollar basis, for the United States as a whole, and for certain regions such as New England, Metropolitan New York, Middle Atlantic, etc., as reported by the A. C. Nielsen Company in its bi-monthly report prepared for the Clorox Company, dated October 18, 1957, covering the two-month period June-July 1957.

It will be noted from the foregoing table that Clorox Chemical's sales during the period June-July 1957 represented 48.8% of the total sales of household liquid bleach in the United States. This same report from which the table was prepared shows that Clorox Chemical's nearest competitor, Purex Chemical Company, which ranked second in sales nationally with a market share of approximately 15.7%, sold less than one-third of the amount of household liquid bleach sold by Clorox Chemical during this period. The third largest seller of household liquid bleach was Roman Cleanser, which company's sales of this product, representing approximately 5.9% of the national market, was less than one-eighth of Clorox Chemical's sales during this period. The fourth largest distributor of household liquid bleach, in June and July 1957, was the John Buhl Products Company, hereinbefore mentioned, with its "Fleecy White" brand, the sales of which represented approximately 4% of the national market. The "Hilex" brand, with 3.3% of total sales, ranked fifth in market shares according to the Nielsen report. Two other companies whose brands of liquid bleach are not named in the report but are included in the "All Others" category are the Hood Chemical Company and the J. L. Prescott Co. each of whose sales of household liquid bleach for the year 1957 exceeded the sales of the Linco brand but were less than those of Roman Cleanser.

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<i>Section of the Country</i>	<i>Clorox</i>	<i>Purex</i>	<i>Fleecy White</i>	<i>Hilex</i>	<i>Linco</i>	<i>Roman Cleanser</i>	<i>Sani- Clor</i>	<i>Terize</i>	<i>All Others</i>
United States	48.8 ¹	15.7	4.0	3.3	2.1	5.9	0.8	0.5	18.9
New England	56.0	— ²	—	—	—	—	—	—	44.0
Metropolitan, New York	64.8	—	—	—	—	—	—	—	35.7
Middle Atlantic	71.6	—	—	—	—	—	—	—	28.4
East Central	42.4	5.0	5.2	0.9	0.7	27.2	—	—	18.6
Metropolitan, Chicago	28.6	0.1	18.9	0.1	50.3	—	—	—	2.0
West Central	34.5	20.6	9.0	25.8	2.1	—	—	—	8.0
Southeast	52.6	16.0	5.7	—	—	5.3	—	3.1	17.3
Southwest	48.4	39.6	3.9	—	—	—	—	—	8.1
Pacific	39.2	42.4	—	—	—	—	6.0	—	12.4

¹ Percent of total sales, liquid bleach, on dollar basis. All dry bleaches have been computed out of the Universe for the purpose of this chart.

² No figure given if the brand listed is not sold in the area.

Source: Trend Table 4, page 77, CX 325. June-July, 1957, bi-monthly period.

*Findings As to the Facts***VII. SOME HOUSEHOLD LIQUID BLEACH MANUFACTURERS SOLD A PORTION OF THEIR OUTPUT TO GROCERY CHAINS FOR RESALE UNDER PRIVATE BRAND LABELS.**

Respondent introduced into evidence a list of more than 200 private brand labels of household liquid bleaches being manufactured and sold.* It appears, however, that the household liquid bleach represented by these 200 odd private brand labels, was manufactured by only 54 manufacturers or suppliers. One label, that of Safeway Stores, represented a private brand manufactured by Safeway, and not by any other manufacturer. Of the 54 manufacturers, six have been mentioned hereinbefore as competitors of Clorox Chemical at the time of the acquisition.

The record indicates that certain of the testifying liquid bleach competitors of the respondent manufactured household liquid bleach for sale by others under private brand labels, in addition to manufacturing and selling bleach under their own brand names. Some of such competitors, and the number of private brand labels of household liquid bleach manufactured by them, for sale by others, were as follows: Purex—34; J. L. Prescott Company—41; and Hood—7. Other competitors, hereinbefore mentioned, which also manufacture private brand labels for sale by others are Lady's Choice Foods, Linco Products Corporation, and Roselux Chemical Company. The following named household liquid bleach producers apparently do not manufacture private brand labels: No-Worry Chemical Company; Sunlight Chemical Company; Savol Bleach Company; and Gardiner Manufacturing Company. The Jones Chemical Company began to sell household liquid bleach under a private brand label to a chain store in 1958.

* Respondent's Exhibit 69A-Z.

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The record does not contain any figures with respect to volume, but from the testimony of officials of these companies it appears that the Hood Chemical Company and the J. L. Prescott Company sold a substantial portion of their household liquid bleach to chain stores under private brand labels. The Linco Products Corporation sold about 12% of its volume to chain stores under private brand labels during the past few years, while the sales of household liquid bleach of other producers to the chain stores under private brand labels were *de minimis*. There is not sufficient evidence in the record to determine or find that the sale of private brand labels of household liquid bleach to grocery chain stores has increased since the year 1955.

Attention is also directed to the fact that, except for the Purex Company, the known manufacturers of private brand label liquid bleach for chain stores are not themselves important factors in the household liquid bleach industry, from the standpoint of their volume of sales. For instance, the combined total sales of such product by Hood Chemical and J. L. Prescott do not represent more than 5% of the industry. It also appears from the record that most of Hood Chemical Company sales of private brand label liquid bleach to chain stores was in the metropolitan New York area; the Linco Product Corporation in the Chicago metropolitan area; and most of J. L. Prescott Company's sales under private brand labels were in and around Boston, Massachusetts, and in the New York City metropolitan area.

There is in evidence, as Commission's Exhibit 645A-M, work sheets containing tabulations of replies and reports made by sales representatives of the Clorox Company, submitted in the fall of 1958, reporting on private brand labels encountered in their respective territories. These

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reports were the basis of Respondent's Exhibit 69A-Z. An analysis of these reports on private label bleach shows that approximately 102 indicated that the sale of private labels had increased, and in 94 such reports it was indicated they had decreased, or that they were very poor; 25 indicated no change; 33 indicated that the percentage of such sales were negligible or of such a small percentage as to be *de minimis*; and 36 reports contained comments which were non-committal and could not be classified in the foregoing category.

Furthermore, it will be noted that in the table appearing on page 17 hereof, containing Nielsen data for the two-month period, June-July 1957, the respective percentages of sales by the different manufacturers do not include their sales of private label brands. However, such sales are included under the heading "All Others," which for those two months were less than 19% throughout the United States which, of course, would include, in addition to private label brands, all household liquid bleach sold throughout the country by all other manufacturers not listed in the table, including the J. L. Prescott Company and the Hood Chemical Company.

In view of the foregoing, it is found that the volume of sales of liquid bleach under private brand labels to grocery chains is not a substantial competitive factor in the household liquid bleach industry.

VIII. RESPONDENT'S MARKET POSITION IN THE SOAP, DETERGENT, AND ABRASIVE CLEANSER MARKETS.

According to Nielsen Food Index reports, P & G is the leading producer in the United States of soap and synthetic detergents, and is one of the two leading producers of abrasive cleanser products. In 1957, P & G sales of packaged detergents in grocery stores was approximately

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54.3% of total value on a consumer dollar basis, and 55% on a consumer unit basis, of the total national sales of such products. P & G consumer sales of toilet soaps in grocery stores in 1957 accounted for approximately 31.2% of total sales on a dollar basis and 37.3% on a unit basis of total national sales.

In the abrasive cleanser grocery store consumer sales market, sales of P & G's "Comet", on a dollar basis, represented approximately 36.5% of the national market in February and March 1958.

IX. P & G'S SELLING AND MERCHANDISING METHODS.***A. Method of Distribution.***

P & G sells all its products, except Clorox, through a subsidiary, Procter and Gamble Distributing Company, which has its own salesmen who call on wholesale jobber and retail outlets in the grocery, drug, department, and variety store fields.

The P & G sales force is divided into sales departments or divisions, each division selling a line of closely related products. For instance, the Case Soaps Sales Department sells all P & G packaged household soaps, cleansers, and synthetic detergents. The Case Food Sales Department sells P & G household edible products, including the acquired Duncan Hines and Big Top products. The Toilet Goods Sales Department sells the toiletries products manufactured by the Company, which includes shampoos, home permanents, and dentifrices. There is also a division which handles paper products.

P & G has approximately 1800 salesmen selling its products, and all of P & G sales personnel, practices and policies are under one man, the P & G Vice President of Sales.

*Findings As to the Facts***B. Shelf Space in Grocery Stores.**

The obtaining and retention of adequate shelf space in retail outlets, particularly in self-service grocery stores, is a fundamental objective of P & G salesmen. In January 1957 P & G inaugurated a "Chain Supermarket Retail Operation" devoted exclusively to shelf space. This program basically sought to realign soap, detergent and cleanser shelf space by grouping products into departments, and dividing said departments into proper classifications, allotting shelf space in ratio to sales movement.

There is an acute shortage of shelf space for all products, including respondent's, in the nation's grocery stores because of the greatly increased number and types of items carried by grocers in recent years. Adequate shelf space today is one of the things manufacturers compete for in grocery stores, especially in the larger supermarkets.

Each P & G salesman, in addition to selling his line of P & G products, is responsible for obtaining advertising and other merchandising support from his customers, and for obtaining retail store shelf and display space for P & G products.

According to the President of respondent: "It's one of the salesman's normal duties to make sure to try to secure adequate shelf space for our brands."

Shelf space is generally allocated by grocers on the basis of the sales movement of a product, and the reputation and merchandising ability of the manufacturer of the product. As one liquid bleach manufacturer witness testified:

"Well, the allocation of shelf space in the grocery stores is controlled by competitive factors that were previously recited; the amount of advertising, the

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amount of promotion, whether or not the product is being couponed or sampled; what sort of consumer promotion might be offered, how much sales help is offered the store manager in re-allocating or re-arranging shelf space, all these things have a factor in determining which product gets the maximum shelf space."

Another chain store grocer witness testified that in allocating shelf space the store owner takes into consideration such factors as advertising, promotion, and the character of the firm that is promoting the product so as to know whether or not it can carry out its promises.

C. Advertising Programs.

Sales movement of products, including respondents, in grocery stores is based primarily on the ability of the producer to advertise and promote its products. Grocers desire "pre-sold" products which they do not have to advertise or promote themselves. "P & G brands are pre-sold through extensive advertising."

A chain store grocer witness testified that consumer acceptance is obtained, "by consistent advertising, radio, television. You name it. They could have many other gimmicks that are paramount to the supermarket industry, not particularly as to bleach or soaps. There are just any number of items that would cause a product to move."

As hereinbefore indicated, P & G is one of the nation's largest advertisers, having spent at least \$79,000,000 to advertise its products in the fiscal year ended June 30, 1957, and approximately \$82,500,000 for that purpose during the calendar year 1957.

Its principal soap and detergent competitors, Colgate-Palmolive, and Lever Brothers, spent approximately \$37,000,000, and \$24,00,000, respectively, during 1957 on

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national advertising. Purex, the principal competitor of respondent in the household liquid bleach business, spent approximately \$3,000,000 in national advertising during the same year.

P & G uses television spot announcements extensively in advertising its products. In 1957 it ranked first in the nation as to amounts expended in this manner, having spent approximately \$25,000,000 compared to approximately \$8,000,000 expended by each of its principal competitors, Colgate-Palmolive and Lever Brothers for this type of advertising.

P & G also uses television programs extensively in advertising its products. It also ranked first in the nation in 1957 on amounts expended in this medium, having expended approximately \$47,000,000. Colgate-Palmolive, its nearest competitor, spent approximately \$19,000,000, and Lever Brothers spent approximately \$16,000,000 for this type of advertising during this period.

The above amounts expended by P & G on television advertising alone indicate the advertising strength of the respondent.

P & G also utilizes radio, newspapers, and magazines extensively in advertising its products, and ranks high in the nation in the last two of these advertising media. It spent substantially more money in advertising in magazines in 1957 than any other detergent producer, and ranked fourth in the nation in magazine advertising.

Discount rates are available to large advertisers which can reduce their advertising cost by as much as 30% (or permit them to purchase substantially more advertising for the same amount of money expended). To earn these discounts, large advertisers may, as P & G does, combine their advertising on a given medium of all their products. This makes the pro-rata cost per product far less than the

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amount required to be paid by the one-product company. Even a company with many products cannot earn discounts comparable to those of P & G if their combined amount of advertising is insufficient to qualify for a maximum discount.

D. Sales Promotion Methods.

In fiscal 1957 respondent P & G charged to profit and loss for sales promotion more than \$47,000,000, which was approximately 5% of the amount of its net domestic sales. In conjunction with its advertising, P & G has promoted its household products by offering to the consumer such promotions as:

1. "Two-for-one" price sales.
2. Special packs wherein a small size is given free or at a reduced price with the purchase of the attached larger size or the entire pack price is reduced.
3. Free samples mailed or delivered to the consumer's residence.
4. Price-reducing coupons mailed to or delivered to the consumer's home, alone or packaged with free samples.
5. Reduced consumer prices on quantity purchases.
6. Free or reduced price merchandise premiums attached to the P & G product or to be sent for by the consumer.
7. Contests with cash and merchandise prizes for the consumer.
8. Cross-couponing of P & G products and of P & G and other nationally known related products in that a price-reducing coupon for one product will be packaged in another P & G product.
9. Combining several of its products in a joint promotion, utilizing combinations of promotions hereinbefore mentioned.
10. Combinations of promotions hereinbefore mentioned for a single product.

*Findings As to the Facts***E. P & G's "Comet" Advertising and Sales Promotion Campaign.**

An example of the effectiveness of P & G's advertising and sales promotion campaigns is found in the "very successful" introduction and customer acceptance of its household cleanser "Comet". In the spring of 1957 respondent P & G introduced nationally its "Comet" brand of abrasive cleanser containing a bleach, with a national advertising campaign, after test marketing in selected areas, utilizing radio, television, newspaper, and magazine advertising, coordinated with extensive consumer promotions. From sometime in 1956 through October 1957, over a period of not more than 22 months, P & G spent for the direct advertising and promotion of "Comet" approximately \$7,200,000. Of this amount, approximately \$4,400,000 was spent in the first ten months of 1957 alone on "Comet" advertising.

As a result of the foregoing campaign, "Comet", according to Neilsen Food Index, steadily and consistently increased its market share, until by the last bi-monthly period of record herein (February-March, 1958) it had attained 36.5% of the national market of all scouring cleansers sold in grocery stores, and was within .4% of tying "Ajax", the leader in this field, for the number one rank. This position was gained by P & G within a period of approximately 20 months, from August 1956 to March 1958.

X. CHANGES MADE BY P & G SUBSEQUENT TO THE ACQUISITION OF CLOROX CHEMICAL.**A. As to Management Personnel of Clorox.**

At the time of the acquisition, respondent P & G took over active control of the Clorox Chemical Company and installed its own personnel in key and controlling policy

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making positions. For example, Mr. Fred Brown, a veteran of 45 years with P & G, formerly in charge of all P & G domestic manufacturing, became Executive Vice President and General Manager of Clorox, reporting directly to Mr. Morgens, the President of both P & G and Clorox. Mr. Brown replaced the former President of Clorox Chemical, Mr. W. J. Roth, who was retained in a consulting capacity only.

P & G also transferred three other men of staff level at the time of acquisition to key positions with the Clorox Company. One, a marketing specialist with P & G who had been responsible for the promotion of several P & G brands, including "Tide", was made a marketing staff associate; another, a manufacturing specialist, became a manufacturing staff associate, reporting directly to Mr. Brown; and a third was placed in charge of Clorox's laboratory controls and the technical phases of its business. Also, in January 1958, a former P & G district manager of case soap sales was made Pacific Coast Division Sales Manager of the Clorox Company.

In view of P & G's wide and successful experience in marketing its products, its technical know-how, together with its financial resources, these changes in the management of Clorox will result in substantial advantages to P & G in the marketing of Clorox liquid bleach.

B. As to Plant Operations.

P & G closed down the Kansas City, Missouri, Clorox Chemical Company plant shortly after the acquisition, and is producing Clorox in a building on its own Kansas City, Kansas, property, with P & G personnel. This action was taken in the interest of economy. Rather than to have two plants manufacturing in the same area, it was decided to combine that production in one plant.

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The Boston plant of Clorox Chemical was also closed down because it was thought that the Eastern territory could be supplied more economically from the Jersey City, New Jersey, Clorox plant.

C. As to Sales Promotion Campaigns.

Respondent P & G has added promotions to Clorox merchandising programs using price-off labels, free premiums, price-reducing coupons, and reduced-price premiums, coordinated with advertising in selling Clorox in selected areas and nationally.

Examples of such promotions include merchandise premiums and special Clorox labels, usually during spring and fall housecleaning drives. One such brochure urges merchant support and stresses the coordinated advertising support in the same manner as is done for other P & G products.

A premium offer of an ironing board cover was made in the southeastern United States in November 1957, in Erie, Pennsylvania, in January and February 1958, and in June 1958, in the southwestern Sales Division of P & G. A premium pack of a dishcloth attached to a bottle of Clorox was also used in Los Angeles in June 1958.

This change to consumer promotion was decided upon by The Clorox Company as early as October 7, 1957.

In the spring of 1958, in the so-called "Clorox Spring Housecleaning Bee", consumer promotions were featured, such as an ironing board cover for 50¢ and a Clorox label.

Also in June 1958, 5¢ price-off labels on gallons were used in metropolitan Chicago, which includes northern Illinois and a part of Wisconsin. Other price-off labels were used in Detroit, Nashville, Chattanooga, and San Francisco between February and July 1958.

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Prior to the acquisition of Clorox Chemical by P & G, the former company had not utilized consumer promotions for a number of years.

The respondent contends (Page 91, paragraph 110, Respondent's Proposed Findings) that in the case of established products, such as Clorox liquid bleach, promotions may result in temporary gains in market share which, following the promotion, recede to their former level. However, the evidence in this case does not support this contention. In fact, in the only instance where evidence of probative value is available which relates the effect of a Clorox promotion directly to market share (Erie, Pa., area, CX450) Clorox's market share increased from 49% of the market during the period October 14 to November 11, 1957, (the period immediately preceding Clorox's "Money Saving Clorox Special" promotion advertised in the Erie, Pennsylvania, Times on November 25, 1957, and followed by other Clorox promotions in that area in January and February 1958) to 63% in the period December 12, 1957 to January 6, 1958.

Although Clorox's market share leveled off after these promotions to 52.9% of the Erie market during the period February 3-March 3, 1958, it retained a gain of almost 4 percentage points in market share in this area.

Even these statistics do not tell the whole story, for while Clorox was increasing its market share of liquid bleach in this area by almost 4 percentage points, the market share of one of its principal, but smaller competitors, Gardiner Manufacturing Company, with its 101 Brand, was decreasing from 25.2% to 22.3% of the market during this period, and "All Other" brands was decreasing from 18.9% to 17.7%.

Furthermore, if the respondent's contention is correct, that promotions result in only temporary gains in market

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shares and then recede to their former level, it is inconceivable that Clorox would earmark \$400,000 of its first advertising budget after the acquisition for such ineffective promotions.

D. As to Advertising.

1. In Magazines.

The Clorox Company, under P & G control, made a number of changes in the magazine advertising as used by Clorox Chemical Company, not only in the kind of magazines used, but in the type of ads appearing therein. For example, in February 1958, Clorox began the use of *monthly full page black and white ads* in some magazines in which Clorox Chemical had run *smaller color ads every other month*. Several magazines that had been used for advertising by Clorox Chemical were dropped entirely and the advertising in others, such as certain farm magazines, was reduced. These latter changes would appear to be consistent with P & G's general policy, as testified to by its advertising manager, of advertising in magazines with national circulation.

2. On Radio.

The Clorox Company, under control of respondent P & G, has doubled the amount of time purchased in television spot announcements of Clorox, compared to the record of Clorox Chemical, and placed less emphasis on radio in conformance with the P & G policy.

Also consistent with P & G policy, subsequent to the acquisition of Clorox Chemical Company, spot announcements on some independent, unaffiliated radio stations were terminated, and were switched to net-work stations which generally offered more listening audience. After the acquisition, 34 radio stations were dropped from Clorox

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advertising, of which 27 were independent stations, unaffiliated with a net-work. One new station was added.

3. On Television.

Clorox has been advertised, since the acquisition, on spot television in new markets wherein the Clorox Chemical Company was not using spot television. Also, television spot advertising has been increased in other markets, wherein the Clorox Chemical Company had done very little television spot advertising.

While Clorox dropped or decreased TV spot advertising in a few markets, that had been used by Clorox Chemical Company prior to the acquisition by P & G, it added or increased its TV spot advertising after the acquisition in a substantially larger number of markets, either not used at all, or used to a more limited degree by Clorox Chemical Company.

The monthly average number of seconds of TV spot advertising used by Clorox Chemical Company in TV markets decreased or dropped by Clorox after the acquisition were 5,956.7, while such average used by Clorox in such markets after the acquisition was 3,597.5, or a decrease of only 2,359.2 seconds. On the other hand, the monthly average number of seconds of TV spot advertising used by Clorox in new or increased TV markets after the acquisition was 96,660 seconds, as compared to a monthly average of 43,277.4 seconds used by Clorox Chemical Company in such territory prior to the acquisition, or an increase of 53,382.6 seconds.

Thus, the total monthly average number of seconds of TV spot advertising used by Clorox Chemical Company before the acquisition, in both decreased and increased TV markets, was 49,234, whereas such average used by Clorox after the acquisition in such markets was 100,257,

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or a net increase of 51,023 seconds. The following tables set forth in detail the monthly average, before and after the acquisition, in (1) New or Increased TV Markets, and (2) Decreased or Dropped TV Markets.

Table 1

(CX-545) New or Increased TV Markets After the Acquisition (Monthly average number of seconds)

	<i>Monthly Average</i>	
	<i>Before</i>	<i>After</i>
Abilene, Texas	0	1005.0
Albuquerque, N. M.	105.0	1560.0
Amarillo, Texas	0	1005.0
Ashville, N. C.	110.0	1552.5
Atlanta, Ga.	783.3	952.5
Austin, Texas	0	1012.5
Baltimore, Md.	1061.6	1150.0
Beaumont, Texas	0	1012.5
Birmingham, Ala.	1200.0	1795.0
Boston, Mass.	1200.0	1647.5
Buffalo, N. Y.	1041.7	1560.0
Charleston, S. C.	81.7	1217.5
Charlotte, N. C.	716.7	1045.0
Chattanooga, Tenn.	0	10.0
Chicago, Ill.	1991.7	2942.5
Cincinnati, Ohio	670.0	907.5
Cleveland, Ohio	1638.3	2820.0
Columbia, S. C.	375.0	1022.5
Columbus, Ohio	718.3	1207.5
Corpus Christi, Texas	0	1012.5
Dallas, Texas	68.3	2212.5
Davenport, Iowa	828.3	1560.0
Denver, Colo.	721.7	992.5
Des Moines, Iowa	785.0	952.5
Detroit, Mich.	933.4	1045.0
El Paso, Texas	185.0	2175.0
Erie, Pennsylvania	0	1695.0

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Evansville, Ind.	0	1620.0
Fort Worth, Texas	0	435.0
Galveston, Texas	600.0	962.5
Greenville, N. C.	70.0	947.5
Harlingen, Texas	0	345.0
Houston, Texas	868.3	1122.5
Indianapolis, Ind.	978.3	1385.0
Jackson, Miss.	845.0	1297.5
Kansas City, Mo.	1700.0	2112.5
Los Angeles, Calif.	1218.3	2205.0
Louisville, Ky.	876.7	1890.0
Lubbock, Texas	1375.0	2602.5
Memphis, Tenn.	831.7	952.5
Miami, Fla.	506.7	987.5
Midland, Texas	0	577.5
Milwaukee, Wis.	0	977.5
New Orleans, La.	660.0	777.5
New York, N. Y.	1726.7	2105.0
Norfolk, Va.	371.7	432.5
Odessa, Texas	0	435.0
Oklahoma City, Okla.	1353.3	2400.0
Peoria, Ill.	800.0	952.5
Philadelphia, Pa.	1256.7	1382.5
Phoenix, Arizona	73.3	1040.0
Pittsburgh, Pa.	908.3	955.0
Portland, Ore.	1086.7	2282.5
Raleigh, N. C.	831.7	1290.0
Roanoke, Va.	71.7	1040.0
Rochester, N. Y.	868.3	2075.0
St. Louis, Mo.	793.3	1042.5
San Angelo, Texas	0	1005.0
San Antonio, Texas	91.7	1825.0
San Francisco, Calif.	1756.6	2027.5
Schenectady, N. Y.	46.7	585.0
Scranton, Pa.	68.3	1040.0
Seattle, Wash.	1191.7	1722.5
Shreveport, La.	68.3	1045.0
Syracuse, N. Y.	1633.3	1897.5
Tampa, Fla.	823.4	865.0

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Temple, Texas	0	465.0
Tucson, Arizona	90.0	1297.5
Tulsa, Okla.	76.7	1360.0
Waco, Texas	0	570.0
Washington, D. C.	745.0	857.5
Wheeling, W. Va.	0	1005.0
Wichita, Kans.	799.0	1382.5
Wichita Falls, Texas	0	1005.0
Youngstown, Ohio	0	1005.0
Total	43,277.4	96,660.0
Increase		53,382.6
Decrease (See Table 2, p. 1)		2,359.2
Net Increase		51,023.4

Source: CX 545 A, B, C, D.

Table 2

(CX-545) TV Markets Decreased or Dropped After the Acquisition (Monthly average number of seconds)

	Monthly Average	
	Before	After
Bellingham, Wash.	1256.7	457.5
Huntington, W. Va.	150.0	0
Jacksonville, Fla.	1050.0	1040.0
Little Rock, Ark.	305.0	0
Omaha, Nebraska	431.7	320.0
Salt Lake City, Utah	1000.0	827.5
Spokane, Wash.	1288.3	952.5
Tacoma, Wash.	311.7	0
Wilmington, N. C.	163.3	0
Total	5956.7	3597.5
Decrease		2359.2
Monthly average number of seconds of TV spots in cities used by the Clorox Chemical Company and not used by the Clorox Company		930.0

Source: CX 545 A, B, C, D.

Findings As to the Facts

The number of cities used by Clorox Chemical Company for TV spot advertisements before the acquisition was 65, while the number of cities used for such purpose by Clorox after the acquisition was 80, an increase of 15 cities.

The monthly average number of seconds of TV spot advertisements used by Clorox after the acquisition, in cities not used at all by Clorox Chemical Company, was 16,197.5 seconds, while such monthly average of TV spots in cities used by Clorox Chemical Company before the acquisition, and not used by Clorox after the acquisition, was only 930 seconds. (See Tables 1 and 2 on the preceding pages).

The number of TV stations used by Clorox for TV spot advertising for the first time after the acquisition was the same as the number of TV stations dropped by Clorox after the acquisition, namely, 28. However, the total number of seconds used by Clorox for such advertising on the 28 new stations for the 8-month period, following the acquisition, August 1, 1957, through March 31, 1958 (157,000), was substantially more than the total number of seconds (104,080) used by Clorox Chemical Company for such advertising during the longer 12-month period, July 22, 1956 through July 31, 1957, on the 28 TV stations dropped by Clorox after the acquisition. (See Tables 3(a) and 3(b) on the following pages).

The Clorox Company used 129,580 seconds of TV spot advertising in 19 new cities during the 8-month period following the acquisition, August 1, 1957, through March 31, 1958, whereas Clorox Chemical Company used only 11,160 seconds of TV spot advertising during the 12-month period, July 22, 1956, through July 31, 1957, in 4 cities which were dropped by the Clorox Company after the acquisition. (See Tables 4(a) and 4(b) on the following pages).

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A further indication of a more aggressive sales policy pursued by Clorox after the acquisition of Clorox Chemical Company by P & G is evidenced by the fact that, while Clorox Chemical Company used only 592,020 seconds of TV spot advertising in the 12-month period prior to the acquisition, Clorox purchased a total of 803,060 seconds of TV spot advertising in the shorter 8-month period immediately following the acquisition. (Source CX545A, B, C, D).

Table 3(a)

*New Television Stations Used by The Clorox Company
for Spot Advertising During the Period
August 1, 1957 - March 31, 1958*

<i>Location</i>	<i>TV Station Used</i>	<i>Total No. of Seconds During Period</i>
Abilene, Texas	KRBC TV	8,040
Amarillo, Texas	KFDA TV	3,480
Amarillo, Texas	KGNC TV	4,560
Austin, Texas	KTBC TV	8,100
Beaumont, Texas	KFDM TV	8,100
Chattanooga, Tennessee ...	WRGP TV	80
Corpus Christi, Texas	KRIS TV	8,100
El Paso, Texas	KROO TV	3,480
Erie, Pennsylvania	WICU TV	13,560
Evansville, Indiana	WFEI TV	12,960
Fort Worth, Texas	WBAP TV	3,480
Harlingen, Texas	KRGV TV	2,760
Los Angeles, California ...	KRCA TV	10,860
Los Angeles, California ...	KTTV TV	480
Miami, Florida	WCKT TV	2,640
Midland, Texas	KMID TV	4,620
Milwaukee, Wisconsin	WTMJ TV	7,820
Odessa, Texas	KOSA TV	3,480
Salt Lake City, Utah	KTVT TV	2,420

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San Angelo, Texas	KCTV TV	8,040
Spokane, Washington	KHQ TV	4,200
Temple, Texas	KCEN TV	3,720
Waco, Texas	KWTX TV	4,560
Wheeling, West Virginia ..	KTRF TV	8,040
Wichita, Kansas	KAKE TV	3,840
Wichita Falls, Texas	KFDX TV	4,560
Wichita Falls, Texas	KSYD TV	4,480
Youngstown, Ohio	WFMJ TV	8,040

Total TV Spot Advertising on New Stations 157,500

Grand Total of Clorox Spot TV Advertising 803,060

Percent Accounted for by New Stations 19.6

Source: CX-545A, B, C, D.

Table 3(b)

TV Stations Used by The Clorox Chemical Co. for Spot Advertising During the Period July 22, 1956 - July 31, 1957, Dropped by The Clorox Co. August 1, 1957 - March 31, 1958

<i>Location</i>	<i>TV Station Used</i>	<i>Total No. of Seconds During Period</i>
Atlanta, Ga.	WSB-TV	3060
Birmingham, Ala.	WBRC-TV	13400
Chicago, Ill.	WBBM-TV	5820
Cleveland, Ohio	WEWS-TV	1200
" "	WJW-TV	5740
Columbus, Ohio	WBNS-TV	1780
Denver, Colo	KLZ-TV	3140
Huntington, W. Va.	WSAZ-TV	1800
Jackson, Miss.	WJTV-TV	1200
Little Rock, Ark.	KARK-TV	3660
Louisville, Ky.	WHAS-TV	300
New York, N. Y.	WCBS-TV	1080

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Oklahoma City, Okla.	KWTV-TV	1440
Peoria, Ill.	WTVH-TV	260
Philadelphia, Pa.	WRCV-TV	6260
Portland, Ore.	KOIN-TV	9960
Raleigh, N. C.	WTVD-TV	1700
St. Louis, Mo.	KWK-TV	2020
San Francisco, Calif.	KGO-TV	40
" " "	KRON-TV	8880
Seattle, Wash.	KING-TV	1560
Spokane, Wash.	KXLY-TV	4300
Syracuse, N. Y.	WSRY-TV	7480
Tacoma, Wash.	KTNT-TV	3740
Tampa, Florida	WTVT-TV	4340
Washington, D. C.	WTOP-TV	4980
Wichita, Kans.	KTVH-TV	2980
Wilmington, N. C.	WMFD-TV	1960

(28 stations dropped)

Total TV Spot Advertising on Stations Dropped 104,080

Grand Total of Clorox Chemical Co.

Spot TV Advertising 592,020

Percent accounted for by stations dropped ... 17.6

Source: CX-545A, B, C, D.

TABLE 4(a)

New Cities in which The Clorox Company Used Spot Television Advertising During the Period August 1, 1957 - March 31, 1958

<i>Location</i>	<i>TV Station used</i>	<i>Total No. of Seconds During Period</i>
Amarillo, Texas	KGNC	4,560
Amarillo, Texas	KFDA TV	3,480
Abilene, Texas	KRBC TV	8,040
Austin, Texas	KTBC TV	8,100
Beaumont, Texas	KFDM TV	8,100

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Chattanooga, Tennessee ..	WRGP TV	80
Corpus Christi, Texas	KRIS TV	8,100
Erie, Pennsylvania	WICU TV	13,560
Evansville, Indiana	WFEI TV	12,960
Fort Worth, Texas	WBAP TV	3,480
Harlingen, Texas	KRGV TV	2,760
Midland, Texas	KMID TV	4,620
Milwaukee, Wisconsin	WTMJ TV	7,820
Odessa, Texas	KOSA TV	3,480
San Angelo, Texas	KCTV TV	8,040
Temple, Texas	KCEN TV	3,720
Waco, Texas	KWTX TV	4,560
Wheeling, West Virginia ..	WTRF TV	8,040
Wichita Falls, Texas	KFDX TV	4,560
Wichita Falls, Texas	KSYD TV	3,480
Youngstown, Ohio	WFMJ TV	8,040

Total TV Spot Advertising in New Cities 129,580

Grand Total of Clorox Spot TV Advertising 803,060

Percent Accounted for by New Cities 16.1

Source: CX 545A, B, C, D.

Table 4(b)

Cities in which the Clorox Chemical Company Used Spot Television Advertising During July 20, 1956 - July 31, 1957, and were dropped by The Clorox Co., August 1, 1957 - March 31, 1958

<i>Location</i>	<i>TV Station Used</i>	<i>Total No. of Seconds During Period</i>
Huntington, W. Va.	WSAZ-TV	1800
Little Rock, Ark.	KARK-TV	3660
Tacoma, Wash.	KTNT-TV	3740
Wilmington, N. C.	WMFD-TV	1960

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Total TV spot advertising in cities dropped	11,160
Grand total of Clorox Chemical Co. spot TV advertising	592,020
Percent accounted for by cities dropped..	1.9

Source: CX-545A, B, C, D.

4. Savings in Advertising Expenditures.

Although the record indicates, as contended by respondent, that the per case rate expenditure for advertising and promotion budgeted by Clorox Chemical in the fiscal year ended June 30, 1957, and by the Clorox Company in the 12-month period ended June 30, 1958, were approximately the same, namely 16.4¢ per case, it appears that under P & G control an estimated savings accrued to Clorox during the latter period in its advertising expenditure as a result of the joint purchase by P & G and Clorox of advertising in the following media, and in the amounts shown:

Television	\$ 86,000.00
Radio	500.00
Magazines	50,000.00
Newspapers	2,000.00
Total Savings	<u>\$138,500.00</u>

In addition, there is evidence which indicates that, if Clorox's advertising was fully coordinated with the advertising of P & G, even more substantial discount savings could be effected, which would enable Clorox to purchase considerably more advertising without increasing its per case rate budget for such purpose.

In an industry where all but a few of Clorox's competitors are small firms with limited financial resources, any such

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an amount of potential additional advertising cannot be considered insignificant.

That respondent P & G expected to accomplish such savings is indicated in a P & G confidential inter-office memorandum, dated February 28, 1957, recommending the purchase of Clorox Chemical by P & G, where the following statement is made:

"We are advised that Clorox spent \$2,660,000 in the last half of 1956 for advertising, or at the rate of \$5,320,000 a year. We believe that *P & G advertising philosophies and economies* applied to an advertising expenditure of this size can be expected to further advance the Clorox business." *

XI: EFFORTS OF CLOROX UNDER P & G OWNERSHIP AND CONTROL TO PREVENT A COMPETITOR FROM ENTERING OR EXPANDING IN THE LIQUID BLEACH MARKET.

1. *In Erie County, Pennsylvania.*

Prior to October 1957, as hereinbefore indicated, Clorox's market share of the household liquid bleach market in Erie, Pennsylvania was more than 50% of the total sales in that area, and the other principal brand of household liquid bleach sold in that market was the 101 Brand, manufactured by the Gardiner Manufacturing Company, which brand enjoyed approximately 30% of the market at that time. On or about October 14, 1957, the Purex Company began a market test in that area by offering a new energized household liquid bleach in a new improved type of container and handle, with a new label attached. A special advertising campaign was put on, and promotional allowances were made to the dealer to enable him to sell the product at a lower price to the public. Coupons were

* Underscoring supplied.

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widely distributed in the Erie area, entitling the housewives to a reduction of from 10¢ to 25¢ on the purchase of new Purex depending upon the size of the container.

Clorox, under the control of respondent P & G, combined an advertising and promotion campaign to prevent the Purex entry into the Erie, Pennsylvania, market. The first step was an advertisement placed in an Erie, Pennsylvania, newspaper on November 25, 1957, described as "Money Saving Clorox Special", and showing Clorox cents-off labels of 7¢ off on gallons, 5¢ off on half-gallons, and 3¢ off on quarts, and emphasizing the fact that the offer was available only in Erie County. Another premium offer was made in January 1958. This was followed, in February 1958, with a "Big Bargain Offer in Erie County" of a regular \$1 ironing board cover for 50¢ with each purchase of Clorox. A special newspaper advertisement, featuring the ironing board cover offer, was scheduled to run in the Erie Times-News on February 20 and 21, 1958, and distributors in Cleveland were furnished quantities of display material to be sent to and used by the dealers in the Erie County area. In addition to the ironing board cover promotion advertisement, to be run on February 20 and 21, a second advertisement appeared in the Erie Times-News on February 27 and 28, 1958, and the dealers were furnished copies of a full-page Clorox advertisement carrying its selling message in the February issues of Good Housekeeping, Better Homes and Gardens, Ladies' Home Journal, and Parent's magazines; also a stepped-up schedule of Clorox television advertising in Erie County supplied additional selling support during the month of February. In addition, reprints of the two Clorox newspaper ads and the magazine ads were sent in quantities to the distributors for mailing to the dealers, along with the bulletins in use at that time by the distributors.

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Clorox continued to run these promotions in the Erie market until the end of March 1958. From October 1957, to March 31, 1958, Clorox spent more than \$4,000 for TV spots, and \$2,400 for newspaper advertisements in the Erie County promotion campaign, although TV spot had never before been used by the Clorox Company to advertise in that area.

As a result of this campaign conducted by Clorox under P & G control, Clorox was successful in nullifying Purex's test market attempt and in preventing Purex from becoming a substantial factor in the Erie County market. Although Purex was able to nearly equal Clorox in its share of the market of household liquid bleach in the Erie area in the period November 11 to December 9, 1957, Clorox was able to regain and even increase its market position in that area by the first of March 1958, at which time the Purex share had been reduced to approximately 7%.

As a final result, according to an official of the Purex Company, the market test that was run in Erie, Pennsylvania, was cancelled out because the Purex market share did not remain at a reasonably good level. He stated: "It is not possible to do the piece of research that we anticipated, and get meaningful results."

An indirect result of the failure to successfully test the market in Erie, Pennsylvania, according to this official of the Purex Company, was the purchase by Purex of the John Buhl Products Company brand of household liquid bleach, "Fleecy-White". When asked for the reasons for the purchase of the John Buhl Products Company, this Purex official stated:

"One was that Purex had been unsuccessful in expanding its market position geographically on Purex liquid bleach. The economics of the bleach business,

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and the strong competitive factors, as illustrated by our experience in Erie, Pennsylvania, made it impossible, in our judgment, for us to expand our market on liquid bleach. Fleecy-White represented a brand that sold in fair volume in a limited geographical area, and this area represented an expansion of our geographical area."

2. In Evansville, Indiana.

The Purex Company also attempted a market test in Evansville, Indiana, at about the same time that it conducted the test in Erie, Pennsylvania. There was the difference that Purex had been selling its product in the Evansville market prior to October 1957, and no price-off coupons were used by it in the test. All that Purex did in the Evansville market, apparently, was to step up their advertising, featuring the newly designed bottle and label. However, Clorox countered by using price-off labels of 2¢, 4¢ and 6¢ in the Evansville market during the time Purex was attempting to test the market in that area.

3. In Other Markets.

At the times the Purex Company introduced its newly designed bottle and handle in other trade areas throughout the country, Clorox systematically countered with such "promotional devices" as price-off labels, coupons on the bottle, newspaper coupons, merchandising packs, and self-liquidating premiums, which were generally offered for periods of four or five weeks at a time. These promotions were put on in different local and regional areas throughout the country, the majority of which were utilized from May through August 1958, in the following recorded market areas: Atlanta, Georgia; Los Angeles and San Francisco, California; Chattanooga and Nashville, Tennessee;

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and the Pacific Northwest. In fact, Mr. Eric Bellingall, Vice President of the Advertising Agency handling the Clorox account testified that: "We drew up a list and had ready a group of these promotions and we got a list of dates when Purex was moving across with its (new) bottle."

When questioned about such promotions, Mr. Bellingall further testified as follows:

"Your Honor, you generally don't wait in most instances to let him get too much of an inroad. Now, we had this research of promotions that I had discussed and as Trimpe reported that the new bottle had shown up in this territory, and so forth, we would then move to counter with one of this pool of things.

We have used as different devices, price off labels, the coupon on the bottle, the newspaper coupon, and so on, and in some territories, we did not meet it with a promotion, but tried to meet it with whatever increase there was in an advertising schedule.

"... Sometimes we won't wait for the full effect of the competitor's promotion to take place with the consumer, that is, if he moves with a promotion, we may elect to move simultaneously or as close to simultaneously as we can. In other instances, and this can depend on holidays and so forth, we wait until we get a better reaction from our distributors in the area, and then try to go in to prevent the second purchase. Am I clear there, where a promotion might do a sampling job for the competitor and we would move against the time that we would judge that the woman would be going back for a second bottle. We don't want her to be setting up a habit of purchasing the thing that she has been temporarily attracted to by a promotion, so there is a variety of timings in this activity."

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XII. SUBSEQUENT TO THE ACQUISITION BY P & G ON AUGUST 1, 1957, CLOROX'S MARKET SHARE OF THE TOTAL HOUSEHOLD LIQUID BLEACH SALES (ON A QUART EQUIVALENT BASIS) HAS INCREASED SUBSTANTIALY.

The following table of comparable bi-monthly periods, before and after P & G acquired Clorox, prepared from the Nielsen reports, shows that for the months of August-September 1956, Clorox's market share, on a quart equivalent basis, was 44.9%; in August-September, 45.5%; and in the same months of 1958, 46.5%. Also, it shows that whereas the sales in October-November 1957, declined .1% from the same month's sales in 1956, the sales for the same two months in 1958 showed an increase of .6% over the October-November 1957, sales. Comparison of the spring months of April-May 1957, prior to the acquisition, with the corresponding spring months in 1958, shows an increase of .8%; and finally, comparison of the summer months of June-July 1957, also prior to the acquisition, with the same months in 1958, a year after the acquisition, shows an increase of 1.2%.

*Comparable Bi-Monthly Periods Before
and After P & G Acquired Clorox
(on a Quart Equivalent Basis)*

CLOROX MARKET SHARE			
	1956	1957	1958
Aug.-Sept.	44.9%	45.5%	46.5%
Oct.-Nov.	45.3	45.2	45.8
Dec.-Jan.	45.4	45.5	...
Feb.-Mar.	45.7	45.7
Apr.-May	44.9	45.7
June-July	45.7	46.9

The following table, also prepared from the Nielsen reports, makes the same comparison on a consumer dollar

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basis and shows an increase from August-September of 1956 to the same period in 1957 of .4%, and in August-September 1958, an increase of 1.1% over the same months in 1957. Making a similar comparison in the months of October-November, it shows a decrease of .4% in 1957 over 1956, and an increase of 1.1% in 1958 over 1957. Comparing the spring months of April-May 1957 with the same spring months in 1958, this table shows an increase of .8%; and comparing the summer months of June-July of these same two years, an increase of .8% is shown.

*Comparable Bi-Monthly Periods Before
and After P & G Acquired Clorox
(on a Consumer Dollar Basis)*

CLOROX MARKET SHARE			
	1956	1957	1958
Aug.-Sept.	48.0%	48.4%	49.5%
Oct.-Nov.	48.6	48.2	49.3
Dec.-Jan.	48.4	48.5	...
Feb.-Mar. ....	...	48.8	48.5
Apr.-May ....	...	48.0	48.8
June-July ....	...	48.8	49.6

XIII. THE CLOROX PROMOTIONS IN 1958 RESULTED IN AN INCREASE OF CLOROX SHARE OF MARKET AND DECLINE IN PUREX SHARE.

As hereinbefore indicated, Clorox ran its counter promotions against Purex in Erie County, Pennsylvania, and Evansville, Indiana, when the latter company attempted to test market both of those territories, from approximately October 14, 1957 to March 31, 1958.

However, the "great majority" of Clorox's counter promotions aimed at Purex ran in May, June and July 1958, in other markets, as hereinbefore indicated. The following table, from Neilsen reports, shows the market shares of

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household liquid bleach sales (on a unit basis), in Purex's liquid bleach distribution area, in the bi-monthly periods immediately preceding and during such last mentioned Clorox promotions.

	<i>Clorox</i>	<i>Purex</i>	<i>All Others</i>
February-March 1958..	39.1%	33.8%	27.1%
April-May " ..	39.5%	32.3%	28.2%
June-July " ..	41.1%	31.7%	27.2%

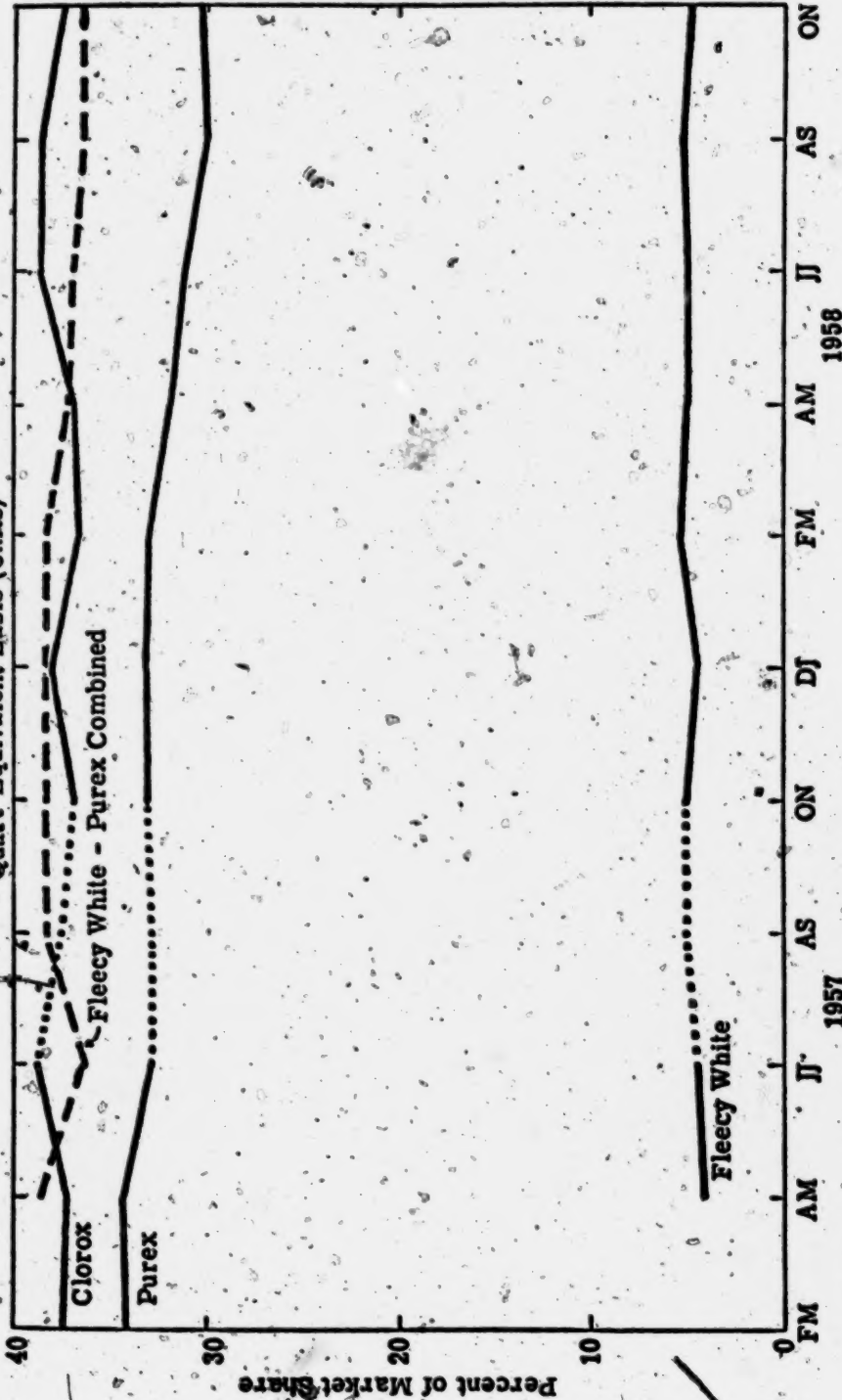
Source: CX 672. (unit basis).

The above table shows that from the period immediately preceding these last mentioned Clorox promotions to the end of July 1958, Purex lost 2.1%, Clorox gained 2.0%, and "All Others" gained 0.1% of their market shares.

The respondent submitted a tabulation of household liquid bleach bi-monthly sales in the Nielsen Pacific, Southwest, and West Central Territories combined, for the period June-July 1957, through October-November 1957, on a unit basis. (RX 91). This tabulation shows that during this period Clorox's share of the market in those areas declined until Purex and Fleecy-White's combined share was larger than that of Clorox. However, the abnormality of that selected period is evident from the following chart, showing for the same territories the percent of market shares of Clorox, Purex and Fleecy-White on a bi-monthly basis, from February-March 1957, through October-November 1958, the latest available data of record. The dotted line portion of this graph shows the period included in respondent's exhibit (RX 91) referred to above. It is evident from this graph that not only did Clorox catch up and pass Purex and Fleecy-White combined by April 1958, but that the Purex share of the market declined below what it was prior to P & G's acquisition of Clorox in August 1957. (RX 91 and CX 668).

Findings As to the Facts

A. C. NIELSEN CO.
PACIFIC, SOUTHWEST, WEST CENTRAL REGIONS COMBINED
MARKET SHARES
Quart Equivalent Basis (Units)



Note: Dotted lines refer to data from RX 91.
Source: Commission Exhibit 668.

*Findings As to the Facts***XIV. THE EFFECT OF THE ACQUISITION OF CLOROX CHEMICAL BY THE RESPONDENT P & G MAY BE TO SUPPRESS THE COMPETITION OF NOT ONLY PUREX BUT OTHER SMALL COMPETITORS.****A. As to the Purex Company.**

According to the testimony of the President of the Purex Company:

"The acquisition of Clorox by Procter & Gamble, in our opinion, will have a serious effect upon Purex's business and Purex's ability to compete in the liquid bleach business, particularly if the same promotion devices which are normally used by Procter & Gamble are applied to the liquid bleach business."

B. As to the Linco Products Corporation.

As hereinbefore indicated, this Company is respondent's principal local competitor in the Chicago, Illinois, territory. The President of that company testified with respect to the effect upon his business of the acquisition of Clorox Chemical by respondent P & G:

"Well, I would say that this acquisition would create a situation where Linco Company will have a hard time to compete. When you stop to look at the resources that they have and the type of promotion that they put up when they buy or put out a new item, you can see that things are very serious. When they start a saturating campaign—that means radio, newspaper, TV, plus sampling, coupons, all that put together, including floor displays in the stores, which they would be able to get following all its advertising; and not only that, but they would be able to get probably more shelf space than competition, and all that together would eliminate the small manufacturer like us."

*Findings As to the Facts**C. As to the Rose-Lux Chemical Company.*

An official of the Rose-Lux Chemical Company, manufacturer of "Rose-X Bleach" brand of household liquid bleach, when asked what effect the acquisition by P & G of Clorox Chemical will have upon his company, testified:

"Well, it's bound to hurt our business and it's bound to decrease our sales."

D. As to the J. L. Prescott Company.

An official of the J. L. Prescott Company, manufacturer of the "Dazzle" brand of household liquid bleach, hereinbefore mentioned, when asked what effect, in his opinion, the acquisition of Clorox Chemical by P & G would have upon his business, testified:

"Well, it is our feeling that if approximately the same promotions are continued that the Clorox Chemical Company used, and in addition to that, things such as coupons, so much off on the label, that type of promotion added to it would definitely be harmful to our business."

E. As to the Sunlight Chemical Corporation.

The President of the Sunlight Chemical Corporation of Rumford, Rhode Island, when asked what some of the competitive factors are which determine whether or not his company sells household liquid bleach, testified:

"I think our main competitor selling liquid bleach is the amount of money that our competitors have to spend for advertising. I do not think it is the product itself of our competitors that we fear as competition because all good brands of bleach are, chemically speaking, identical. They bear a different trade name. It is the ability of the larger companies to spend tremendous amounts of money in advertising that gets

Findings As to the Facts

them the business instead of the smaller company like ourselves."

When asked specifically what effect the acquisition of Clorox Chemical by P & G would have on his business, he testified:

"—I still think it would be more difficult for us to sell with a stronger competitor. It seems to me that is only logical. The stronger your competitor, the more resourceful, the more experienced, the more money he has, the more business he should get, and less we should get.

"So I say almost unqualifiedly that we will suffer by this taking over of Clorox by Procter & Gamble."

F. As to the Savol Company.

A partner of the Savol Chemical Company of Hartford, Connecticut, hereinbefore mentioned, when asked what effect the acquisition of Clorox Chemical by respondent P & G would have on his business, testified:

"Frankly, we have learned to live with Clorox. As an individual I am a little bit apprehensive if Procter & Gamble goes on with the method of advertising, method of sampling, method of coupons, and the method of sales that they have used with Procter & Gamble products, both to the wholesaler and to the individual stores, of what they may do to the bleach business.

"Again, I am speaking as an individual. We have a little business. We are trying to get along. We are not trying to coop in or take in the entire world. We are making a living. If and when the advertising, if Procter & Gamble would go out with advertising such as they have with other of their products, it would take very little to put us out of business because there

Findings As to the Facts

isn't enough of a spread or a profit that we are making.

"And that is the thing that troubles me a little bit, and I can't help but be a bit apprehensive of it."

G. As to the Gardiner Manufacturing Company.

The President of the Gardiner Manufacturing Company of Buffalo, New York, hereinbefore mentioned, testified that he generally followed the Clorox price structure in selling to the trade, and when asked what effect the acquisition of Clorox Chemical by P & G would have upon his business, testified as follows:

"Well, I am scared of it, definitely, because of their larger capacity, purchase, advertising matter—makes it that they can cover the trade at a much lower cost than I can. They have a much larger sales force, which is selling their other products, which can also promote the Clorox. The entire business really scares us because of the possibilities of what could happen."

H. As to Jones Chemicals, Inc.

The President of Jones Chemicals, Inc., of Caledonia, N. Y., hereinbefore mentioned, when asked what effect, if any, the acquisition of Clorox Chemical by P & G would have upon his business, testified:

"If Clorox—runs along the way they have been running, in the experience that I have had with them for 27 years, then I feel that my company or any of our associates could meet them in the market place and operate satisfactorily as we have in the past. If they become a more aggressive merchandiser, getting away from the newspaper technique of influencing sales through newspaper advertising and go to the

Findings As to the Facts

more, you might say, dynamic form of merchandising such as only soap people know how to employ, then people like myself would be in trouble."

I. As to B. T. Babbitt Company.

The B. T. Babbitt Company had long been a competitor of P & G in the detergent and cleanser field. As hereinbefore indicated, it acquired Chemicals, Inc., in August 1956, which manufactured a household liquid bleach which it sold under the brand name "Vano" in and around San Francisco, California. The Babbitt Company continued to manufacture and sell this product until about April 1958, when it decided to discontinue manufacturing its household liquid bleach.

The Chairman of the Board and Treasurer of this company testified that his firm had a policy since approximately 1953 not to compete unnecessarily with the "soapers", referring to soap manufacturers. When asked what effect, if any, the acquisition of Clorox Chemical by P & G would have on the Vano liquid bleach business, he testified:

"From this point on, it isn't going to have any effect, because several months ago we decided to discontinue manufacturing the product."

Since the witness was testifying in June 1958, it is apparent that the decision to discontinue the manufacture was shortly prior to that date, or about April 1958. He further testified that:

"We acquired the Vano Liquid Bleach in August of 1956 and have not promoted the product or advertised the product since the franchise of Clorox was so strong, so I feel that one of the contributing factors

Findings As to the Facts

to our decision to discontinue the product was the acquisition of Clorox by Procter & Gamble, since it was obvious that we would not, under these conditions, entertain any thought of establishing a satisfactory franchise on Vano Liquid Bleach."

XV. THE ADDITION OF CLOROX TO THE P & G LINE OF SOAPS, DETERGENTS, AND CLEANSERS WILL ADD MERCHANDISING STRENGTH AND SUPPORT TO CLOROX WHICH WAS NOT AVAILABLE TO THE CLOROX CHEMICAL COMPANY.

There is an abundance of evidence in this case that there is a definite relationship between soap products, detergents, household cleansers and household liquid bleach, such as Clorox. This is apparent from their very nature, the uses to which they are placed by the housewife, and the way in which they are placed, grouped and displayed on the shelves of the grocery stores, and the promotional effort that is put behind those items. As pointed out by an official of one of the Clorox competitors:

"The multi-product manufacturer can maintain stronger sales reports at the retail level. This is an aid in getting shelf space. The multi-product manufacturer normally has lower sales cost, so he has more promotion power; this is an aid in getting shelf space. The more products a manufacturer in our general commodity class sells to the grocery store at a profitable volume, of course, the more power he has to promote, and all these things are aids in getting shelf space."

Another competitor testified that household liquid bleach is very definitely adaptable to the promotional techniques used by soap companies. He pointed out that household liquid bleach is used by 95% of the housewives in the

Findings As to the Facts

United States, and that when such an item is so universally used, it is very adaptable to merchandising techniques.

XVI. THE INDUSTRY-WIDE CONCENTRATION OF THE PRODUCTION AND SALE OF HOUSEHOLD LIQUID BLEACH MAY BE INCREASED.

While the acquisition of Clorox Chemical by P & G in and of itself did not immediately result in increased industry-wide concentration in the production and sale of household liquid bleach, the record indicates that the results flowing from the acquisition already have resulted in some increased concentration and may well, in time, result in even more increased concentration in the production and sale of household liquid bleach.

For example, as a result of Purex's unfortunate experience at the hands of Clorox, when it attempted to test market its improved bleach and container in Erie, Pennsylvania, and Evansville, Indiana, Purex decided that its only opportunity to increase its sales and expand its territory was through acquisition, and it therefore acquired the Fleecy-White brand of household liquid bleach, thus increasing the concentration in that industry.

Another example is the decision of the B. T. Babbitt Company to discontinue the sale of its Vano brand of household liquid bleach, as a result of the acquisition of Clorox Chemical by P & G.

In addition, it would appear reasonable to expect P & G, with its financial resources available for the advertising and promotion of Clorox at any time and any place, and to the extent it may deem desirable, together with its admitted managerial, advertising and promotional expertise, to continue to increase the Clorox share of the market at the expense of its smaller and less resourceful competitors.

*Conclusions***CONCLUSIONS**

The acquisition in this proceeding presents a novel question, one that has never been passed upon by either the Federal Trade Commission or the courts in a formal proceeding. It is what might be called a conglomerate type of acquisition, or merger, in that the Clorox Chemical Company, the acquired corporation, was engaged in the sale and distribution of household liquid bleach, a product which respondent Procter & Gamble, the acquiring corporation, had never manufactured or sold. This product, however, is distributed to the public mainly through grocery stores and is used principally in the home as an adjunct to laundry soaps, detergents, and abrasive cleansers, and thus might be considered complementary to such products, which are the principal products manufactured and sold by respondent.

To determine whether this acquisition is in violation of Section 7 of the Clayton Act, as amended, attention must be given to that industry in which the acquired corporation was engaged, and an attempt made to evaluate the impact on competition in that industry growing out of the acquisition. In order to do that, it is necessary to take into consideration the size and experience of the acquiring corporation in the conduct of its business prior to the acquisition, the manufacture and sale of products sold by it over the past few years, and then to make an evaluation of what the normal result probably will be when a corporation such as Procter & Gamble, the acquiring corporation, enters into the other industry, and utilizes the same methods of operation that it utilized in its prior fields of endeavor.

Following this pattern, or approach to the problem in this case, we find that the respondent herein is, and has been for a number of years, a financially powerful and aggres-

Conclusions

sive commercial organization which depends on advertising and sales promotion practices and methods described in the above findings, through which, and by which, it has succeeded in becoming the largest manufacturer and distributor of soaps and detergents in the United States, and a leading manufacturer of other household products such as abrasive cleansers. The respondent is recognized as one of the largest, if not the largest, advertiser, that is, it has spent more money in recent years in advertising its products than any other industrial organization in the United States, with the possible exception of one other corporation. In addition to its national advertising campaigns, it has effectively engaged in aggressive competitive sales promotion programs, few of which had been used by the acquired corporation, Clorox Chemical, the leader in the household liquid bleach industry, prior to the acquisition, although some competitors of Clorox Chemical had used some of such programs.

From the foregoing Findings as to the Facts, therefore, it is concluded that as hereinbefore indicated, the line of commerce in this case is household liquid bleach; the sections of the country involved are the entire United States and the nine sections, or regions, described above. It is also concluded that one of the results of the acquisition of Clorox Chemical by the respondent, P & G, probably will be the substantial lessening of competition between the respondent-owned Clorox and the smaller manufacturers and distributors of household liquid bleach, in the United States, and the definite tendency to create a monopoly in the respondent P & G in the household bleach industry, based on one or more of the following factors:

A. The dominant market position in the household liquid bleach industry held by Clorox, which it, under control of the respondent, has been able to increase as a result of the

Conclusions

acquisition and the various advertising campaigns, sales promotion programs and devices engaged in since the acquisition.

B. Respondent's financial and economic strength and advertising and promotional experience as compared with its competitors in the household liquid bleach industry.

C. Respondent's ability to command consumer acceptance of its products and to acquire and retain valuable shelf space in independent and chain grocery stores as a result of its advertising and promotional experience and financial resources.

D. The competitive position or share of market enjoyed by Clorox, under respondent's control, in the production and sale of household liquid bleach has been enhanced to the detriment of actual and potential competition. It can fairly be anticipated that, if Clorox, a wholly owned subsidiary of respondent P & G, continues its present methods of promotion and advertising, its dominant competitive position will be further enhanced.

E. The increasing tendency of concentration of competitors in the household liquid bleach industry.

F. The ability of Clorox, through its aggressive P & G inspired advertising and sales promotion methods and devices, to prevent the entry of additional competitors into the household liquid bleach industry, and to prevent the competitors it already has from expanding by normal methods of competition.

G. Furthermore, according to the testimony of officials of competing manufacturers and distributors of household liquid bleach, there is at the present time an apparently well-founded fear on their part that the aggressive advertising and sales promotion methods of respondent P & G used by Clorox in the household liquid bleach industry will result in serious injury to their business. As hereinbefore

Conclusions

mentioned, the record indicates that it was not the policy of the Clorox Chemical Company, the acquired corporation, to meet the sales promotions or test marketing of its smaller competitors with aggressive counter-promotions and retaliatory tactics. It had attained its leading position in the household liquid bleach industry mainly by national advertising. However, the evidence indicates that it has been the policy of Clorox, since its acquisition by P & G, to meet, and meet vigorously, the promotions and test marketing of its competitors. As hereinbefore related, these retaliatory tactics have been used especially against Purex, the second largest household liquid bleach manufacturer in the industry.

In view of the facts set forth in the aforesaid Findings, and these Conclusions, and in the light of the avowed purpose of the amendment to Section 7 to protect small units in an industry, it is held that the acquisition of the Clorox Chemical Company by respondent The Procter & Gamble Company is a violation of Section 7 of the Clayton Act, as amended December 29, 1950, and an order of divestiture should be entered to restore, insofar as possible, the competitive situation in the household liquid bleach industry existing prior to the acquisition.

The foregoing legal conclusion is supported by the House Committee Report:¹

"If for example, one or a number of raw material producers purchases firms in a fabricating field (i.e. a 'forward vertical' acquisition), and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated, even though there did not exist any competition between the acquiring (raw material) and the acquired fabricating firms.

¹ H.R. Rep. 1191, 81st Cong., 1st Sess., p. 11 (1949).

Conclusions

"The same principles would, of course, apply to backward vertical and conglomerate acquisitions and mergers.

*"The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy." **

The U. S. Supreme Court, in the Dupont case, also supports this legal conclusion in the following language: ¹

"The first paragraph of Section 7, written in the disjunctive plainly is framed to reach not only the corporate acquisition of stock of a competing corporation where the effect may be substantially to lessen competition between them, but also corporate acquisitions of stock of corporations, competitor or not, where the effect may be either (1) to restrain commerce in any section or community, or (2) tend to create a monopoly of any line of commerce . . .

*"We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the Section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. . . ." **

ORDER OF DIVESTITURE

IT IS ORDERED that respondent The Procter & Gamble Company, a corporation, and its subsidiaries, officers, directors, agents, representatives and employees, shall cease and desist from violating Section 7 of the Clayton Act, as hereinbefore set forth in the Findings hereof, and shall divest itself of all assets, properties, rights or privileges,

* Emphasis supplied.

¹ 353 U.S. 586, pages 590-91-92.

Order of Divestiture

tangible or intangible, including but not limited to, all plants, equipment, trade names, trademarks and goodwill acquired by said respondent as a result of the acquisition of the assets of the Clorox Chemical Company, together with the plant, machinery, buildings, improvements, equipment and other property of whatever description which has been added to them, in such a manner as to restore it as a going concern in the manufacture and sale of household liquid bleach in which the said Clorox Chemical Company was engaged, in substantially the same productive capacity as was possessed by the said Clorox Chemical Company at, and immediately prior to, the time of the said acquisition by respondent The Procter & Gamble Company.

IT IS FURTHER ORDERED that by such divestiture none of the stocks, assets, rights, or privileges, tangible or intangible, acquired or added by respondent, shall be sold or transferred, directly or indirectly, to anyone who is at the time of divestiture, or for two years before said date was, a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with, or under the control, direction, or influence of respondent or any of respondent's subsidiary or affiliated corporations.

/s/ EVERETT F. HAYCRAFT,
EVERETT F. HAYCRAFT,
Hearing Examiner.

June 17, 1960.

[Caption Omitted]

NOTICE OF INTENTION TO APPEAL :

(Received July 15, 1960)

To The Honorable Robert M. Parrish, Secretary:

COMES NOW respondent, The Procter & Gamble Company, by its attorneys, and in accordance with Rule 3.22

Notice of Intention to Appeal

of the Commission's Rules of Practice for Adjudicative Proceedings, gives notice of its intention to appeal from the initial decision of the Hearing Examiner filed on June 17, 1960 and served on July 7, 1960.

Respectfully submitted,

JOSEPH C. DINSMORE,
RICHARD W. TODD,
KENNETH C. ROYALL,
FREDERICK W. R. PRIDE,
ROBERT D. LARSEN,

By /s/ ROBERT D. LARSEN,
Attorneys for Respondent.

Dated: July 15, 1960

[Caption Omitted]

NOTICE OF INTENTION TO APPEAL

(Received July 15, 1960)

COMES NOW counsel supporting the complaint in the above-entitled matter and notifies the Commission that he intends to appeal the failure of the Hearing Examiner to make certain findings of fact in his Initial Decision in this matter and to appeal certain rulings of the Hearing Examiner limiting counsel supporting the complaint in his proof during the course of the hearings.

Respectfully submitted,

/s/ WILLIAM R. TINCHER,
WILLIAM R. TINCHER,
*Counsel Supporting the
Complaint.*

July 15, 1960.

Order Remanding Proceeding to Hearing Examiner

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

Commissioners:

PAUL RAND DIXON, *Chairman*
ROBERT T. SECREST
SIQRD ANDERSON
WILLIAM C. KERN
PHILIP ELMAN

In the Matter of
THE PROCTER & GAMBLE COMPANY,
a corporation.

**Docket
No. 6901**

**ORDER REMANDING PROCEEDING TO
HEARING EXAMINER**

(Received June 15, 1961)

Counsel supporting the complaint and respondent having filed cross-appeals from the initial decision in this matter; and

The Commission having determined that the record as presently constituted does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition of Clorox Chemical Co. on competition in the production and sale of household liquid bleach, and being of the opinion that the record should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits:

IT IS ACCORDINGLY ORDERED that the initial decision be, and it hereby is, vacated and set aside.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of such further evidence concerning the

Opinion of the Commission

competitive effects of the aforementioned acquisition as may be offered in conformity with the views expressed in the accompanying opinion of the Commission.

IT IS FURTHER ORDERED that after the receipt of such additional evidence the hearing examiner make and file a new initial decision on the basis of the entire record herein.

By the Commission, Chairman Dixon and Commissioner Elman not participating.

[SEAL]

/s/ JOSEPH W. SHEA
JOSEPH W. SHEA,
Secretary.

ISSUED: June 15, 1961

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, *Chairman*
ROBERT T. SECREST
SIGURD ANDERSON
WILLIAM C. KERN
PHILIP ELMAN

In the Matter of
THE PROCTER & GAMBLE COMPANY,
a corporation.

Docket
No. 6901

OPINION OF THE COMMISSION

By the Commission:

The complaint in this matter charges respondent, The Procter & Gamble Company, with violating Section 7 of

Opinion of the Commission

the Clayton Act, as amended, by acquiring the assets and business of Clorox Chemical Co. (hereinafter referred to as Clorox). The hearing examiner has filed his initial decision holding that the acquisition violated Section 7, as alleged, and the matter is now before the Commission on cross-appeals of respondent and counsel supporting the complaint. The complaint alleges in substance that the acquisition of the dominant firm in the household liquid bleach field by the leading producer in related product fields may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of household liquid bleach. It specifically charges in this connection that producers of household liquid bleach may be unable to compete with respondent due to any one, any combination of, or all of the following factors:

- (a) Respondent's market position;
- (b) Respondent's financial and economic strength;
- (c) Respondent's advertising ability and experience;
- (d) Respondent's merchandising and promotional ability and experience;
- (e) Respondent's "full-line" of cleansing and laundry products;
- (f) Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space;
- (g) Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability.

As the hearing examiner has pointed out, this case involves a conglomerate acquisition and is therefore one of first impression. In all previous Section 7 proceedings before the Commission, the challenged acquisitions were of either a vertical or horizontal nature. Here, however, the

Opinion of the Commission

acquiring firm was neither a supplier or customer, nor a competitor of the acquired. Such a merger, therefore, does not have the effect of automatically foreclosing to competitors any market outlet or source of supply as in a vertical merger, nor does it have the effect of automatically eliminating a competitor as in a horizontal merger. Nevertheless, such a merger violates Section 7 if it has the proscribed effect. We repeat here with emphasis our recent holding in the *Scott Paper* case:¹ "Under Section 7, as amended, any acquisition whether it be vertical, conglomerate or horizontal is unlawful if the effect may be substantially to lessen competition or to tend to create a monopoly in any line of commerce."² Therefore, respondent's contention that this type of acquisition is not embraced by Section 7 has no merit and is rejected.

The question in this proceeding thus is whether the proscribed effect may in fact result from this particular acquisition where the only immediate effect is the replacement of one competitor by another. In making this determination, the same tests apply as in any other matter coming within the purview of Section 7, but since a conglomerate acquisition does not have the above-mentioned "automatic" effects of a vertical or horizontal merger, such a determination is necessarily difficult to make from a consideration of evidence relating solely to the competitive situation existing in the relevant market prior to the acquisition and to the pre-merger status of the acquired and

¹ *In the Matter of Scott Paper Company*, Docket 6559 (Dec. 16, 1960).

² This holding follows both from the language of the statute and from relevant legislative history. The House Committee report stated:

"... the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly." (H.R. Rep. No. 1191, 81st Cong. 1st Sess. p. 11 (1949).)

Opinion of the Commission

acquiring corporations. Consequently, a consideration of post-acquisition factors is appropriate.

In this case, the hearing examiner has placed considerable emphasis on evidence relating to the post-acquisition activities of Clorox. Relying primarily on this evidence, he has concluded that the dominant market position held by Clorox in the production and sale of liquid bleach has been enhanced to the detriment of actual and potential competition; that there is an increasing tendency of concentration of competitors in the liquid bleach industry and that other liquid bleach producers will be unable to expand their operations by normal methods of competition. While we are of the opinion that, in the circumstances of this case, he was correct in considering this evidence, we do not agree that it supports his conclusions with respect to the probable effects of the acquisition.

The hearing examiner has found in this connection that, subsequent to the acquisition, Clorox has systematically countered the promotional activities of Purex Chemical Company, the second largest producer of liquid bleach, by its own advertising and promotional campaigns in various market areas throughout the country. With one exception, however, the effectiveness of these counter promotional activities cannot be determined from the record. The evidence discloses that in one market area, Erie, Pennsylvania, Purex was unsuccessful in its attempt to conduct a market test by reason of respondent's counter promotions. We do not believe that it can be inferred from this one showing, however, that the same results would occur in other market areas that Purex or other producers may attempt to enter or in which they may attempt to expand their operations.

The hearing examiner has also found that, subsequent to the acquisition, Clorox's market share of the total house-

Opinion of the Commission

hold liquid bleach sales had increased substantially. This finding is based on data obtained from reports covering the period August, 1957, to November, 1958, made by the A. C. Nielsen Company Marketing Service. It appears that the increase in the Clorox market share in the first twelve months of this period was .3 of one Nielsen point and, in the entire sixteen months, .42 of one Nielsen point. This increase, however, is only about half of the average increase of .8 of one Nielsen point made by Clorox in each of the five years prior to the acquisition. The hearing examiner's failure to consider this pre-acquisition growth trend of Clorox detracts from his conclusion that there had been a substantial increase in the dominant market position held by Clorox as a result of the acquisition.

In our opinion, the post-acquisition data neither supports the hearing examiner's conclusions nor does it indicate in any manner that the acquisition will not result in a substantial lessening of competition or tendency toward monopoly. As pointed out by counsel supporting the complaint, very few of respondent's merchandising techniques were used during the first eight months after the acquisition. Thereafter, when consumer promotions were used, although only on a limited basis, the market share of Clorox increased sharply. Moreover, counsel supporting the complaint contend that, during the sixteen month period after the acquisition, respondent had put into effect only a few of the changes which it might reasonably be expected to make in the production and merchandising of liquid bleach. These changes did not extend to the use of respondent's manufacturing facilities, the use of respondent's sales force in place of independent brokers, coordination of the advertising and promotion of Clorox with respondent's full line of related products and the use of national television ad-

Opinion of the Commission

vertising. According to counsel supporting the complaint, it is only when respondent begins to use the merchandising techniques and methods by which it has achieved spectacular successes against major competition in the soap and detergent fields that the full impact of this financially powerful corporation will be made on competition in the liquid bleach industry.

The record as presently constituted does not provide an adequate basis for determining the legality of this acquisition. In the circumstances, we might dismiss the complaint and direct our staff to maintain continuing surveillance of this market, with the possibility of bringing another complaint in the future if we think it warranted. We believe, however, that the public interest will be better served and the respondent not unduly inconvenienced by our remanding the case for the taking of additional evidence. This is likely to obviate the necessity of a plenary proceeding in the future that would be more costly in time and money to both the Commission and respondent than adding to the present record. Moreover, this disposition of the matter, providing as it will a more complete and detailed post-acquisition picture, has the advantage of allowing the Commission an informed hindsight upon which it can act rather than placing too strong a reliance upon treacherous conjecture.

The case will, therefore, be remanded to the hearing examiner for the reception of evidence relating to the competitive situation as it presently exists in the liquid bleach industry. This evidence should relate to events occurring subsequent to November 1958, and should include market share data in each of the geographical regions specified on page 17 of the initial decision, as well as information directed to more clearly delineating the production and mer-

Order Scheduling Hearing

chandizing facilities and techniques which have been utilized by Clorox under the control of respondent.

Chairman Dixon and Commissioner Elman not participating.

June 15, 1961.

[Caption Omitted]

ORDER SCHEDULING HEARING

(Received Nov. 7, 1961)

IT IS HEREBY ORDERED that a hearing be held on November 30, 1961, at 10:00 a.m., in Room 532, Federal Trade Commission Building, Washington, D.C., to take further evidence concerning the competitive effects of the respondent's acquisition of Clorox Chemical Co., pursuant to the direction of the Commission in order dated June 15, 1961.

/s/ EVERETT F. HAYCRAFT
EVERETT F. HAYCRAFT,
Hearing Examiner.

November 6, 1961.

[Caption Omitted]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS, AFTER REMAND, FILED BY RESPONDENT, THE PROCTER & GAMBLE COMPANY

(Received Jan. 15, 1962)

To The Honorable Everett F. Haycraft, *Hearing Examiner*:

Pursuant to the rules of practice of the Federal Trade Commission and the ruling of the Hearing Examiner made on December 12, 1961, the respondent in the above entitled

Preliminary Statement.

proceeding, The Procter & Gamble Company, by its attorneys, submits to the Hearing Examiner its proposed findings of fact and conclusions for his consideration and respectfully requests that the Hearing Examiner find the facts accordingly and include these proposed findings and conclusions in his revised initial decision as his findings and conclusions.

PRELIMINARY STATEMENT**1) Analysis of Commission's Opinion and Order**

On June 15, 1961, the Commission issued its Opinion and Order on the cross-appeals filed from the Initial Decision in this proceeding.

By such Order the Commission vacated and set aside the Initial Decision.

It held (p. 1) that the record which was before it "does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition of Clorox Chemical Co. on competition in the production and sale of household liquid bleach."

By such Order the Commission also remanded the proceeding to the Hearing Examiner "for the reception of such further evidence concerning the competitive effects of the aforementioned acquisition as may be offered in conformity with the views expressed in the accompanying opinion of the Commission."

In its accompanying Opinion the Commission gave the reasons which underlay its decision. It initially noted (p. 2) that "this case involves a conglomerate acquisition." It then defined the issue in a conglomerate acquisition (p. 3) to be "whether the proscribed effect may in fact result from this particular acquisition where the only immediate effect is the replacement of one competitor by another."

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Throughout its Opinion the Commission emphasized that in a conglomerate acquisition, this issue was to be resolved by an evaluation of the objective evidence as to the "probable effects of the acquisition."

Then, after reviewing various aspects of the evidence, the Commission stated (p. 3):

"... we do not agree that [the evidence] supports [the Examiner's] conclusions with respect to the probable effects of the acquisition."

And the Commission expressly concluded that (p. 5):

"The record as presently constituted does not provide an adequate basis for determining the legality of this acquisition. In the circumstances, we might dismiss the complaint. . . ."

We submit that the Opinion and Order of the Commission represent a clear and unequivocal decision. It is a decision that the evidence, in the record which was before it, *was insufficient to establish any violation of Section 7*. This decision is binding on the parties and on the trial examiner and is controlling.

2) Scope and Purpose of the Remand

The Commission's Opinion further indicated the scope and purpose of the remand. It concluded with the statement (p. 5) that: "The case will, therefore, be remanded to the hearing examiner for the reception of evidence relating to the competitive situation as it *presently exists* in the liquid bleach industry." It added that: "This evidence should relate to *events occurring subsequent to November 1958*, and should include market share data . . . as well as information directed to more clearly delineating

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the production and merchandising facilities and techniques [of Procter] which have been utilized by Clorox under the control of respondent." *

The Commission's Order ended (pp. 1 and 2) with the provision that:

"... after the receipt of such additional evidence the hearing examiner make and file a new initial decision on the basis of the entire record herein."

Since the Commission has found that the evidence in the record before it was not sufficient to support an order against the respondent, there is only one reasonable interpretation to be placed upon the above provision in its Order. That is, that the burden is squarely placed on the complainant to establish, from any new evidence it could adduce on remand, that a violation of Section 7 had occurred, particularly with respect or attributable to those factors enumerated by the Commission in its Opinion.

Thus, in effect, the Commission has held that the evidence which was in the record before the Commission is merely a background against which the Examiner is to gauge such new evidence as the Commission had envisaged would be offered on remand.

In other words, if the complainant could affirmatively establish that as a result of the acquisition there has been

* In its Opinion the Commission enumerated various matters which it plainly anticipated would be the subject of evidence to be offered by Commission's counsel on the remand. These, in addition to market shares, related to (a) any utilization and the effect thereof, of counter promotional activities; (b) any additional "concentration of competitors in the liquid bleach industry"; (c) any inability of competitors "to expand" "by normal methods of competition"; (d) any changes in the use of "manufacturing facilities"; (e) any use of Procter's "sales force in place of independent brokers"; (f) any "coordination of the advertising and promotion of Clorox with [Procter's] full line of related products"; and (g) any use of "national television advertising." We will refer to each of these matters in the presentation of our proposed findings.

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any substantial lessening of competition since November 1958, an order should issue against the respondent. On the other hand, if today there exists no more evidence respecting any claimed lessening of competition than existed in November 1958, or if, as the respondent contends, the market position of competitors has been enhanced, or will in the future probably be enhanced, over what it was in November 1958, then the action must be dismissed.

3) Issues Foreclosed by Commission's Opinion and Order

There is one particular issue in this case which has been completely foreclosed by the Commission's Opinion. This is the point that evidence of Procter's size, its financial resources, or its experience and success in the merchandising of its other products was not sufficient in this case to support a finding that a "probable" lessening of competition would result from the acquisition.

All of the evidence pertaining to Procter's resources, to its expertise in marketing, to its success in merchandising other products, to its various other facilities, was in this record before the Commission reviewed it. The Commission in its Opinion (pp. 1 and 2) expressly adverted to it. In no respect has anything of substance been added in these areas on the remand.*

Thus we repeat that all of the evidence on these matters was and continues to be insufficient to establish a violation of Section 7.

Further, the Commission's decision in removing from this case any issue involving Procter's "size and success" is directly in line with its later decision with respect to the

* On the remand, Commission's counsel did introduce several exhibits reflecting Procter's present financial position. These, however, in no way indicate that, in respect of the matter of "size," Procter's financial position has substantially or comparatively changed since the acquisition.

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conglomerate merger aspects of the *Union Carbide* case.* There, too, it directly gave expression to the proposition that, in a conglomerate merger case where there is only the replacement of one competitor by another, the fact that the acquiring company has assets and resources much larger than the company acquired is of no determinative significance.

4) Objective Proof in a Conglomerate Merger Case

There is another significant aspect of the Commission's Opinion. This proceeding was the first true conglomerate merger which had come before the Commission. As stated in the Commission's Opinion, it was a case of "first impression."

In enunciating the considerations which were controlling in determining the legality of such an acquisition, the Commission stressed the distinction between this and a horizontal or vertical merger. It said (p. 3) that such a determination is necessarily more difficult than in a case in which there are "automatic" effects on competition resulting from the acquisition *per se*.

In line with this, the Commission emphasized that actual facts—based upon experience—are more meaningful in a conglomerate merger case than prophecy or speculation. In the language of the Commission (p. 5) it was remanding the proceeding so as to secure "a more complete and detailed post-acquisition picture, [which] has the advantage of allowing the Commission an informed *hindsight* upon which it can act rather than placing too strong a reliance upon *treacherous conjecture*."

This expression, we contend, requires the Examiner to predicate his decision on objective, current facts, and the

* In the Matter of *Union Carbide Corporation*, F. T. C. Docket 6826 (Sept. 25, 1961).

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reasonable inferences to be drawn therefrom. He is to forego prophecy and "treacherous conjecture."

The Commission has thus laid down two new and important principles in determining the legality of a conglomerate acquisition.

First, while holding that in appropriate circumstances Section 7 can be violated as a result of a conglomerate acquisition, the Commission clearly distinguished between the difficulty in establishing a violation in the case of a conglomerate acquisition and the lesser burden in the case of a horizontal or vertical acquisition, where an effect on competition automatically flows from the acquisition itself.

The second principle emphasized by the Commission is in accord with and supplements the first. In its Opinion, the Commission deprecated the use of guesswork in a conglomerate merger situation and emphasized the importance of long-term and representative factual situations. This must be recognized as a step in the direction of realism. The factual situation now developed in this case is an excellent illustration of this principle. The facts introduced in the record on the remand now enable the Examiner, in accordance with the Commission's decision, to decide this case on a representative sample of more than four years. They make possible the discarding of temporary, fragmentary, isolated and conjectural incidents. They eliminate any necessity for relying on broad inferences and conclusions based only on speculation.*

* The ruling of the Commission differentiating between conjecture and "hindsight" has a special application in this case. For here the Examiner did give great weight to "conjectures" and prophecies, including the unsupported opinion of competitors and broad speculations keyed to facts which were of a temporary or non-representative nature. We can understand that, on the basis of language in decisions dealing with horizontal or vertical acquisitions, the Examiner could have felt justified in following this course.

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The Commission's Opinion thus provides guidance in what was previously an uncharted area in the determination of the legality of conglomerate acquisitions. This guidance is particularly pertinent in evaluating the record in this proceeding. For here the complainant has failed to sustain its burden of factually proving that, with the "hindsight" of four post-acquisition years, there *has been* or probably will be a substantial lessening of competition or tendency to monopoly in the liquid bleach industry as a result of the acquisition of Clorox by Procter.

RESPONDENT'S PROPOSED FINDINGS

A. Findings Re Certain Matters Which the Commission Directed or Indicated Were to Be Considered on the Remand

As we have previously pointed out, the Commission indicated that there were certain specific factors which should be examined on the remand. These involved matters relating to the competitive situation which presently exists in the liquid bleach industry. And as to these matters the Commission forcefully said that it wanted facts rather than prophecies. The clear implication of the Commission's Opinion is that it would regard such evidence to be of determinative significance.

It thus clearly placed upon the complainant the burden of showing the nature and effect of any post-acquisition "changes" or circumstances which had had any adverse competitive effects. The proposed findings which we here set forth in this section will relate to these matters.

Preliminarily, we note that it is with respect to the great majority of these matters that the record before the Examiner on remand is most remarkable. For there is a complete absence of any proof by complainant as to them. Not

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only is there an absence of any proof; there is also an absence of any basis even for an inference that the acquisition has been followed by any anti-competitive "changes"—regardless of cause or effect.

1. There is no evidence that as a result of any change since November 1958 any of the respondent's manufacturing or production facilities have been utilized for the manufacture or production of Clorox.

[*Comment:* Had any such utilization of any of Procter's facilities been made, such fact could have been readily established. Failure of Commission's counsel to introduce any such proof, or even to suggest that any such proof existed, compels the conclusion that no change in the facilities used for the manufacture and production of Clorox has taken place.]

2. There is no evidence that in the merchandising of Clorox any use has been made of Procter's own sales force, or that Clorox's method of distribution through independent brokers has been changed in any respect. Nor is there any evidence that there is any plan or intention to change such method of distribution or that any change would be more economical or effective.

[*Comment:* In the original hearings counsel for the complainant confidently predicted that a change to direct selling through Procter's salesmen was imminent. In addition, it was asserted that distribution through brokers would surely be discontinued because direct selling was more economical and desirable.

There is, of course, not a shred of evidence indicating that any change in the method of distribution has been made or is contemplated or is desirable. The only possible inference is that distribution through independent brokers has continued to be successful.]

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3. There is no evidence that there has been any coordination of the advertising and promotion of Clorox with any other Procter product or with Procter's line of products. Nor is there any evidence that any such coordination would be desirable or effective or that so-called "savings in advertising expenditures" would be effectuated as a result thereof.

[*Comment:* Here, again, not a scintilla of evidence bearing upon this subject was offered. Yet had any such "coordination" taken place it could readily have been established. Again, this was one of the confident predictions not only of Commission's counsel but of competitive bleach producers.]

4. There is no evidence that since November 1958 Clorox has increased its shelf space in grocery stores or that it has any disproportionate amount of shelf space or that it has any "command" over more shelf space than, or as much shelf space as, its competitors.

[*Comment:* The matter of shelf space is, of course, simply another item as to which not a single reference was made by Commission's counsel at the hearings on the remand, even though the effect of the acquisition on the allocation of shelf space was a subject in which the Commission several times voiced its interest in the oral argument before it.]

5. There is no evidence that since November 1958 the production or distribution of Clorox has been advantaged by the use of any of Procter's technical, research or other facilities, or that any of the same have been utilized to the detriment of any competing bleach producer.

[*Comment:* Here, once more, the record is silent. And this despite all of the magnified claims in the earlier

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hearings as to the importance and effect of these facilities.]

6. There is no evidence that since November 1958 there has been any use by Clorox of network television advertising, or that Clorox has at any time used any network television advertising, or that any use of network television advertising would be effective or desirable in the merchandising of Clorox liquid bleach.

[*Comment:* Once again there is not a word concerning this subject which was harped upon so extensively in the initial hearings and in complainant's appeal to the Commission.]

7. There is no evidence that since November 1958 there has been any concentration of competitors in the liquid bleach industry. Nor is there any evidence from which it could be inferred that any tendency towards such concentration exists.

8. There is no evidence that since November 1958 any other bleach producer has been unable to expand its operations by normal methods of competition. Nor is there any evidence that since 1958 any other bleach producer has been dissuaded from expanding its operations by reason of the acquisition or otherwise.

9. There is no evidence that since November 1958 any producer of liquid bleach was required to withdraw or did withdraw from the liquid bleach business.

10. There is no evidence that since November 1958 any competitor of Clorox has been adversely affected by any activities of Clorox while under the control of respondent in either the production, merchandising or distribution of household liquid bleach.

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[*Comment:* We direct particular attention to the three preceding proposed findings. They have an especial significance in the present posture of this proceeding.]

The Examiner will recall that complainant's counsel in the initial hearings elicited testimony from numerous competitors of Clorox. With varying degrees of partisanship, they glibly speculated as to damaging effects which the acquisition might have on their businesses. The identities of these prior witnesses have, of course, been known to complainant's counsel. They could have been made available as witnesses, on the remand, had counsel chosen to call them.

Yet not a single one of them was called to testify. Commission's counsel have seen fit to elicit not a word from these competitors as to whether any of their "fears" had been well-founded or borne out. And this despite the Commission's emphasis upon "hindsight."

We maintain that the Examiner must conclude that had these witnesses (or any other competitors of Clorox) been called their testimony would have been adverse to the complainant, and that they could not have testified that they had been adversely affected by the acquisition.

Indeed, as will be reflected in later proposed findings, the position of Clorox's competitors since the acquisition has been steadily and substantially improved.]

11. There is no evidence that there are or have been any barriers to the entry of any prospective producer into the liquid bleach industry or that any prospective producer has been excluded for any reason whatsoever.

[*Comment:* There never was in the record any evidence that any prospective newcomer into the liquid bleach field was faced with any "barriers" which dissuaded him from engaging in business. Nothing has been added to fill that vacuum.]

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The proposed findings contained in the above section might appropriately be listed under a heading "What Complainant Has Not Shown" or "Disproven Prophecies." We emphasize again that the Commission itself certainly invited the complainant to make whatever factual showing it could in respect of these matters. We say that complainant's failure to do so can only reasonably be construed by the Examiner as indicating that no such facts in support of the complainant exist.

B. The Market Share Position of Clorox Liquid Bleach Before and After Acquisition

The Commission's Opinion plainly indicates the significance which it attaches to evidence respecting the trend of market shares. At page 4 of its Opinion it properly notes that no conclusion can be reached with respect to the substantiality or materiality of any post-acquisition Clorox market share increase, which is claimed to be a result of the acquisition, without consideration of and comparison with the "*pre-acquisition growth trend of Clorox.*"

Post-acquisition statistical data were available for only a limited time period at the close of the initial hearings. Now there are before the Examiner market share figures for four full years following the acquisition. These undisputed figures show that the growth trend of Clorox in those four years was substantially identical with the trend prior to the acquisition. From the analysis of the market share figures in the following proposed findings, we submit that no conclusion can be drawn other than that the market share trend of Clorox has not been enhanced, either as a result of the acquisition or otherwise.

12. Nielsen data respecting market shares in the household liquid bleach industry are compiled and reported on

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both a 32-ounce equivalent unit basis and on a consumer dollar basis.¹ The 32-ounce equivalent unit basis is preferable to the consumer dollar basis as a reflection of market conditions or market share data because it measures the actual volume of merchandise moving through grocery stores, and is not influenced by retail price changes, temporary or otherwise.²

[*Comment:* Statistical data used throughout these findings with respect to household liquid bleach moving through grocery stores in the United States are based upon the Nielsen Food Index Reports and exhibits prepared therefrom which were offered in evidence. The accuracy of Nielsen figures was stipulated by both parties at the instance of complainant in the initial hearings (Tr. 2066A-2066^D) and reaffirmed by counsel for both parties during the hearings on remand (Tr. 6275).]

Record support: ¹ Nickelson, Tr. 6273-4.

² Nickelson, Tr. 6280-1.

13. The use of *annual* figures is best for appraising market and competitive conditions.

[*Comment:* The Commission in its Opinion (p. 4) relied upon annual market share figures. The use of the Nielsen data on an annual basis was acknowledged as proper by the complainant's sole witness on remand, Mr. Stratton (Tr. 6333-36). As Mr. Nickelson, Executive Vice President of the A. C. Nielsen Company, stated in the initial hearings (Tr. 5469-70) and again stated without contradiction in the hearings on remand (Tr. 6285), the use of annual figures is best for appraising market and competitive conditions. This is because a 12-month period eliminates seasonal and other fluctuations which may greatly influence and distort the results of any comparison between bi-

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monthly shares for successive reporting periods or between bi-monthly share or shares in one year as compared to the same bi-monthly period or periods in another year.]

14. The annual changes in Clorox market share of the total sales of household liquid bleach in the United States, moving through grocery stores, for each of the four years preceding the acquisition and for each of the four years following the acquisition on a 32-ounce equivalent unit basis are as follows:¹

PRIOR TO ACQUISITION

<i>Year Ended August 1.</i>	<i>Clorox Share</i>	<i>Point Change</i>
1953	41.4	—
1954	43.0	+1.6
1955	44.0	+1.0
1956	44.8	+0.8
1957	45.3	+0.5
Total Change		+3.9
<i>Average Annual Change Prior to the Acquisition</i>		+0.975

Record support: ¹ RX 134 A. This exhibit and other prepared by Mr. Nickelson and introduced in evidence by respondent cover 12-month periods ended August 1, the date of acquisition and the annual anniversary date thereafter. This is the only Nielsen 12-month period which permits presentation of the situation before and after acquisition on an annual basis and which permits an analysis of all of the Nielsen data in the record. The use of market share data on this basis was adopted by the Commission in its Opinion and will be used throughout the findings wherever available.

*Respondent's Proposed Findings***SUBSEQUENT TO ACQUISITION**

<i>Year Ended</i> <i>August 1.</i>	<i>Clorox Share</i>	<i>Point Change</i>
1958	45.8	+0.5
1959	46.8	+1.0
1960	48.8	+2.0
1961	48.6	-0.2
Total Change		+3.3
<i>Average Annual Change</i> <i>Subsequent to the Acquisition</i>		
		+0.825

15. The average annual Clorox market share gain in the four years following the acquisition, on a 32-ounce equivalent unit basis, was 0.825 of one Nielsen point, a slight decrease from the 0.975 of one Nielsen point average annual Clorox market share increase in the four years prior to the acquisition.¹

Record support: ¹ RX 134 A.

16. On the consumer dollar basis, the annual changes in Clorox market share of the total sales of household liquid bleach in the United States, moving through grocery stores, for each of the four years preceding the acquisition, and for each of the four years following the acquisition are as follows:¹

Record support: ¹ RX 135 A.

PRIOR TO ACQUISITION

<i>Year Ended</i> <i>August 1.</i>	<i>Clorox Share</i>	<i>Point Change</i>
1953	45.3	—
1954	46.4	+1.1
1955	47.1	+0.7
1956	47.8	+0.7
1957	48.4	+0.6
Total Change		+3.1
<i>Average Annual Change</i> <i>Prior to the Acquisition</i>		
		+0.775

*Respondent's Proposed Findings***SUBSEQUENT TO ACQUISITION***Year Ended**August 1.**Clorox Share Point Change*

1958	48.7	+0.3
1959	50.1	+1.4
1960	51.8	+1.7
1961	51.9	+0.1
Total Change		+3.5

*Average Annual Change**Subsequent to the Acquisition* +0.875

17. On the consumer dollar basis, the average annual Clorox market share gain in the four years following the acquisition was 0.875 of one Nielsen point as compared to 0.775 of one Nielsen point for the four years prior to the acquisition.

Record support: ¹ RX 135 A.

18. In the four years following the acquisition, the average annual gain in Clorox market share *declined* 0.15 of one Nielsen point on the 32-ounce equivalent unit basis and *increased* 0.10 of one Nielsen point on the consumer dollar basis.¹ A small change of this kind has no statistical significance.² Thus, there is no significant difference between the post- and pre-acquisition growth trend of Clorox.

[*Comment:* The calculation of the post- and pre-acquisition growth trend of Clorox market share in these two exhibits adopts the method used and commented upon by the Commission in respect of the pre-acquisition growth trend of Clorox market share.]

Record support: ¹ RX 134 A; RX 135 A.

² Nickelson, Tr. 6287.

19. In view of the substantially identical growth trends of Clorox market share in the four years preceding and in

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the four years following the acquisition, such gain as there was in the Clorox market share in the four years following the acquisition cannot be attributed to or be deemed to result from the acquisition.

20. Market share data for the most recent 12-month period are the more indicative of *current market conditions* in the liquid bleach industry than such data for any other single prior 12-month period.¹

Record support: ¹ Nickelson, Tr. 6290.

21. In the most recent 12-month period, the absolute Clorox market share on a 32-ounce equivalent unit basis *declined* 0.2 of one Nielsen point from the Clorox market share in the preceding 12-month period.¹ On the consumer dollar basis, the absolute Clorox market share *increased* only 0.1 of one Nielsen point.² In no other 12-month period during the entire eight years prior to August 1, 1961 (the entire period for which data are available), was there a decline in the Clorox market share from the preceding 12-month period on either the 32-ounce equivalent unit basis or on the consumer dollar basis.³ In no other 12-month period during the eight years prior to August 1, 1961 was the increase in the Clorox market share over the preceding 12-month period, on any basis, as little as 0.1 of one Nielsen point.³

Record support: ¹ RX 134 A.

² RX 185 A.

³ RX 134 A; RX 135 A.

22. There is no evidence indicating any reasonable probability of a significant or substantial increase in Clorox market share in the future. On the contrary, the current market position of Clorox liquid bleach undeniably indicates a leveling off of the absolute Clorox market share.

23. In addition to compiling and reporting data on a nationwide basis, the Nielsen Food Index also reports mar-

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ket share data for each of the nine *standard* Nielsen "reporting" territories.¹

[*Comment:* Respondent objected to the admission in evidence of Nielsen data relating to market share statistics in the nine standard Nielsen "reporting" territories (Tr. 6253-55).

In support of its objection, respondent proffered evidence to the effect that these standard Nielsen territories have no relationship whatsoever to areas of effective competition in the household liquid bleach industry (Tr. 6306).

The following proposed findings analyze the Nielsen market share data on a regional basis without waiver of respondent's objection to the relevancy of these data. See Tr. 6308.]

Record support: ¹ Nickelson, Tr. 6296.

24. There is no proof that the nine standard Nielsen "reporting" territories delimit areas of effective competition in the household liquid bleach industry.

[*Comment:* The standard Nielsen reporting territories are arbitrarily established by the A. C. Nielsen Company (Tr. 1797). The Nielsen reports are broken down into these territories regardless of the product or the industry as to which Nielsen is reporting and regardless of the respective marketing areas of the products covered. The Examiner in his Initial Decision found that the geographical confines of any regional and local markets cannot be fixed with any exactitude (Initial Decision, p. 13). These facts were uncontested in the initial hearings and complainant's counsel introduced no evidence on the remand relating to the geographical confines of any areas of effective competition in the liquid bleach industry.

We do not know what contentions, if any, the complainant may make in connection with the standard

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Nielsen "reporting" territories and we therefore defer further comment, if any, until our Reply.]

25. Market share data, on a 32-ounce equivalent basis, within each of the standard Nielsen territories, both before and after the acquisition, have been summarized.¹

[*Comment:* As stated at the hearings on the remand, respondent, while preserving its objection to the materiality of any such evidence, submitted these summaries for the convenience of the Examiner.]

Record support: ¹ RX 136 A-R.

26. In the nine standard Nielsen "reporting" territories, the post-acquisition growth trend of Clorox, as compared to such trend in the pre-acquisition period, declined in six of the territories, was the same in one territory, and increased in only two of the territories.¹

Record support: ¹ RX 136 A-R.

27. There is no evidence since November 1958 as to market or competitive conditions or the activities of competitors of Clorox within any one of such Nielsen territories.

[*Comment:* Thus, there are no criteria from which to determine or evaluate the effect of Clorox competition in such territories.]

28. There is no proof that the changes in the market share in any of the Nielsen territories were a result of or attributable to or affected in any way by the acquisition.

29. The fact that there is no uniformity in such territorial changes throughout the country leads to the conclusion that the acquisition has not been a factor which has influenced either upward or downward changes.

*Respondent's Proposed Findings***C. Findings Relating to Merchandising "Techniques"**

The Commission stated that it desired information as to "merchandising techniques" which have been utilized by Clorox since November 1958.

As to this aspect of the remand, complainant contented itself by introducing Commission's Exhibit 718.* It contained a list and a description of each promotion engaged in by Clorox from July 1958 through July 1961. It showed the cost of each such promotion. It also showed the Clorox brokerage areas in which each promotion was conducted, thus indicating which of the promotions were national in scope and which were confined to particular areas.

Since this is the only proof respecting any merchandising "techniques" which have been engaged in by Clorox, we frankly confess that we do not understand what meaningful conclusions can be adduced from it.

True, it does supplement the proof introduced in the initial hearings showing that consumer promotions had been utilized in merchandising Clorox since the acquisition. But that fact was disclosed in the record which was before the Commission, and was not deemed determinative or conclusory in any sense.

Likewise, the record prior to remand showed that, for the fiscal year ending in June 1958, expenditures approximating \$400,000 were contemplated for Clorox promotions, in addition to the expenditures for the theretofore established Spring and Fall Housecleaning promotions. Still there was no indication in the Commission's Opinion that this was an inordinate expenditure or had any trade-restraining consequences. It is now disclosed that the average amount of *all* promotional expenditures for the last three fiscal years, ending July 1961, was relatively in

* This exhibit had been voluntarily furnished by the respondent.

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line with what had been budgeted for the first year following the acquisition.

Consequently, no point can be made that there has been any greatly stepped-up promotional activity, regardless of the effect of any such activities and regardless of whether they were related to the acquisition in any way.

There is, however, one interesting sidelight respecting this evidence. The expenditures for promotions, as to which the market effect would be reflected in the Nielsen bi-monthly reports for the 12-month period August 1, 1960-July 31, 1961, were not significantly different from those for the two preceding 12-month periods. In both of the prior periods the Clorox market share increased.* Yet, as is shown in our foregoing proposed findings respecting market shares, the Clorox market share *declined 0.2 of one Nielsen point during the last 12-month period* although expenditures for promotions were substantially the same as in the three preceding years. If any conclusion can be drawn, it must be that promotional activities of the nature engaged in by Clorox have no discernible effects, as such, in the market.

30. All of the types of promotions engaged in by Clorox in the period from July 1958 through July 1961 were well known in the liquid bleach industry and each such type of promotion had been used at various times by Clorox's competitors. Likewise, each such type of promotion was well known to Clorox's sales executives and advertising agency. There is no evidence that the availability of any "ex-

* As testified by Nickelson, and as is readily apparent, merchandise which is involved in a promotion and is first shipped from a Clorox plant in July, for example, requires time to reach the grocery shelves and be available to consumers. For this reason, consumer sales of merchandise shipped in July would (to any appreciable extent) be reflected in the Nielsen reports no earlier than the August-September bi-monthly period (Tr. 6292-95).

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pertise" or experience possessed by Procter was a factor in the conception or implementation of any such promotion.

[*Comment:* A most cursory examination of the types of promotions used by Clorox, as listed in Commission's Exhibit 718, plainly indicates that each of them was similar to promotions regularly engaged in by producers of all sorts of consumer products. As to the use of such promotions by others in the liquid bleach industry, see citations to the record which are set forth in support of Respondent's Proposed Finding of Fact 103, submitted to the Examiner at the conclusion of the initial hearings.]

31. There is no evidence that any promotion engaged in by Clorox was combined or connected with any promotion involving any product of Procter.

[*Comment:* This was true with respect to promotions considered in the course of the initial hearings. There is no suggestion whatsoever that the same situation does not exist at the present time.]

32. There is no evidence that any promotion engaged in by Clorox from July 1958 through July 31, 1961 was conducted for other than fair and proper business purposes, or that any such promotion was predatory in purpose or effect, or that any such promotion was designed or calculated to impair the ability of Clorox's competitors to compete or enter new markets, or had any such effect.

33. The expenditures by Clorox for promotional activities in the fiscal years 1958-59, 1959-60 and 1960-61 were substantially in line with promotional expenditures programmed for the fiscal year 1957-58. There is no evidence that there is any probability that the amount of such expenditures will be materially increased in the future or that any increased expenditures would be effective.

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[*Comment:* As indicated above, total promotional expenditures for the fiscal year ending June 30, 1958 included not only the additionally budgeted amount of \$400,000 but also included expenditures for the theretofore established Spring and Fall Housecleaning promotions.]

34. There is no evidence that there is any relationship between Clorox's expenditures for promotions and any changes in Clorox's national market share.

[*Comment:* See our statements in the introduction to this section.]

35. No meaningful conclusions can be drawn respecting the effects of any promotion, as such, whether the promotion was national in scope or confined to a particular area. This is so because no valid comparisons are possible unless there is at least some evidence respecting the competitive activities of others, including advertising and promotion, the tastes of the consuming public in terms of quality, packaging, etc., and various other factors. There is no such evidence in this record.

[*Comment:* We submit that the Examiner's wide experience is such as to make the above finding self-evident.]

36. There is no evidence that the promotions engaged in by Clorox, or any of them, have resulted in any lessening of competition or tendency to monopoly in the liquid bleach industry.

[*Comment:* In the initial hearings there was evidence with respect to the use by Clorox of advertising and promotional campaigns to counter the promotional activities of Purex, Ltd. The Commission in its Opinion noted that only as to one market area, Erie, Pennsylvania, was there any evidence as to the effect of such campaigns on a competitor. It called attention to the complainant's failure to sustain the burden

Respondent's Proposed Findings

of its position relative to the effect of promotions in other market areas. That failure is even more evident on the remand. For there is no evidence that any of the promotions engaged in by Clorox since November 1958 have had any effect on particular competitors or on competition generally in any market area.

Actually, later proposed findings relating to the current competitive situation as to Clorox's competitors will demonstrate that their position has relatively improved. Likewise, as shown by our proposed findings heretofore set forth concerning market share, no promotional or other activities have occasioned any substantial change in Clorox's market share position. And as to the year ending July 31, 1961, there has been no gain in the Clorox market share.]

37. As to certain Clorox promotions, which were confined to particular areas of the country, there is no evidence from which can be determined the extent, if any, to which such promotions had any effect upon Clorox's market share or sales or upon the market shares or sales of competitors.

[*Comment:* We maintain that none of the statistical evidence introduced on the remand will permit of any attempted correlation of regional promotional activities and regional market shares or sales.]

D. Findings Respecting Present Economic and Market Position of Clorox's Competitors

The probable substantial lessening of competition with which Section 7 is concerned is not the adverse effect of an acquisition on an individual competitor, but the effect upon competition *in general*. In the following proposed findings, we deal with the record evidence as it relates to the *actual business* which has been and is being done by all of the competitors of Clorox as a group. This avoids the obvious infirmity of basing any conclusion upon the individual

Respondent's Proposed Findings

experience of a particular competitor, whose business prosperity may rise or fall depending upon a multitude of reasons.

We note, however, that even as to individual competitors, there is no proof that any one of them has been adversely affected by the acquisition. As previously pointed out, none of the bleach producers in competition with Clorox was called upon to testify in the hearings on remand. Not one of those witnesses who appeared previously was asked to testify as to the effect of the acquisition on his business. The failure to recall any of these witnesses is made understandable by a consideration of the uncontradicted facts supporting the following proposed findings. For they show that the competitors of Clorox are today selling *more bleach for more money* than they have at any time in the history of the industry.

38. The sales of the competitors of Clorox, as a group, for each of the five years before and the four years after the acquisition, on both a 32-ounce equivalent and a consumer dollar basis, are as follows:¹

**SALES OF ALL LIQUID HOUSEHOLD BLEACHES—OTHER
THAN CLOROX**

<i>Year Ended</i> <i>August 1</i>	<i>Prior to Acquisition</i>	
	<i>32-ounce Equivalent Units</i>	<i>Consumer Dollars</i>
1953	270,011,000	\$39,178,000
1954	273,046,000	40,230,000
1955	290,092,000	43,443,000
1956	308,797,000	46,638,000
1957	319,734,000	49,478,000

Record support: ¹ RX 137.

*Respondent's Proposed Findings**Subsequent to Acquisition*

1958	329,656,000	\$53,910,000
1959	345,726,000	56,287,000
1960	346,038,000	56,197,000
1961	365,354,000	59,254,000

39. In the four years subsequent to the acquisition all bleach producers competing with Clorox for sales of household bleach through grocery stores in the United States sold almost 200,000,000 more 32-ounce equivalent units of household liquid bleach than such producers sold in the four years immediately prior to the acquisition.¹

Record support: ¹ RX 137.

40. During the 12-month period ended August 1, 1961, all bleach producers competing with Clorox for sales of household liquid bleach through grocery stores in the United States sold approximately 45,000,000 more 32-ounce equivalent units of household liquid bleach than such producers sold in the 12 months immediately prior to the acquisition.¹

Record support: ¹ RX 137; Nickelson, Tr. 6312.

41. In the four years subsequent to the acquisition the sales of all bleach producers competing with Clorox for sales of household liquid bleach through grocery stores in the United States were more than \$45,000,000 greater than they were in the four years prior to the acquisition.¹

Record support: ¹ RX 137.

42. During the 12-month period ended August 1, 1961, the sales of all bleach producers competing with Clorox for sales of household liquid bleach through grocery stores in the United States were approximately \$10,000,000

Respondent's Proposed Findings

greater than they were in the 12-month period immediately prior to the acquisition.¹

Record support: ¹ RX 137; Nickelson, Tr. 6312.

43. During the 12-month period ended August 1, 1961, all bleach producers competing with Clorox for sales of household liquid bleach through grocery stores in the United States sold over 19,000,000 32-ounce equivalent units of household liquid bleach more than they did in the preceding 12-month period ended August 1, 1960.¹

Record support: ¹ RX 137; Nickelson, Tr. 6314.

44. During the 12-month period ended August 1, 1961, the sales of all bleach producers competing with Clorox for sales of household liquid bleach through grocery stores in the United States were more than \$3,000,000 greater than they were in the preceding 12-month period ended August 1, 1960.¹

Record support: ¹ RX 137; Nickelson, Tr. 6314.

45. The competitors of Clorox in each year since the acquisition have sold more liquid bleach for more money than they did in any year prior to the acquisition.¹

Record support: ¹ RX 137; Nickelson, Tr. 6314-15.

46. In the 12-month period ended August 1, 1961, the competitors of Clorox sold more bleach for more money than they had sold at any time previously in the history of the liquid bleach industry.¹

Record support: ¹ RX 137; Nickelson, Tr. 6315.

The effect of gauging the results of a conglomerate acquisition by factual hindsight rather than conjecture and prophecy is evidenced by the proposed findings in this section. They demonstrate the infirmities in relying upon the expressed concern of competitors as to the future of

Respondent's Proposed Findings

their respective companies when faced with competition from Clorox under Procter ownership. Although unjustified, their concern may be understandable because any manufacturer naturally views with uncertainty and, in most cases, alarm, any action of any kind by one of his substantial competitors. But "hindsight" has shown the groundless basis for their fears.

The Examiner in the initial hearings, very understandably, was impressed by these expressions of concern. For, at the close of the previous hearings, there was little evidence to disprove these "guesses" concerning the future effect of the acquisition on competition. The record on remand now permits an informed judgment based upon four years of Clorox operations under Procter's ownership. That record shows that the "conjectures" and prophecies of the competitors of Clorox had no basis in fact. That record also shows that the current sales position of these competitors as a group has substantially improved since the acquisition.

The foregoing findings in this section also clearly support and warrant the following proposed findings.

47. The acquisition of Clorox by Procter has not had and there is no reasonable probability that it will have any adverse effect upon the bleach industry or upon the market position or competitive ability of other bleach producers in competition with Clorox.

48. The acquisition has not resulted in, and there is no reasonable probability that it will result in, any lessening of competition or tendency to monopoly.

[*Comment:* We submit the two foregoing proposed findings with the observation that the evidence now before the Examiner plainly requires their adoption.

We submit that, particularly in a conglomerate merger case, it would be paradoxical—indeed unthink-

Respondent's Proposed Findings

able—that there could be a finding that there has been, or *probably* would be, any substantial lessening of competition in an industry in which competitors have steadily and markedly increased the volume and dollar amount of their sales since an acquisition.]

E. Conclusory Findings Based Upon the Entire Record, and Reflecting the Commission's Opinion

As heretofore noted, the Commission's Order concluded with the direction that a new initial decision be filed on the basis of the entire record herein.

We construe this to mean that the Examiner should relate the evidence after the remand to what the Commission has said respecting the record as it existed before the remand. Or stated differently, that the Examiner should recast the findings which were controlling in his Initial Decision so as to reflect the entire record.

In our view this does not require any complete set of new findings. The effect of adopting the findings which we are here proposing does not mean that certain of the initial *factual* findings made by the Examiner are wrong. It does mean that such facts, when considered in the light of informed hindsight, do not now establish a violation of Section 7. It also means that they certainly do not now support in any way a finding that there was or is a reasonable probability of an adverse effect on competition as a result of the acquisition.

In line with these views, we here submit the following proposed findings and conclusions, which modify the conclusory findings contained at the end of the Examiner's Initial Decision.

49. There is no proof that one of the results of the acquisition of Clorox Chemical by the respondent "probably" would be the substantial lessening of competition be-

Respondent's Proposed Findings.

tween the respondent-owned Clorox and the smaller manufacturers and distributors of household liquid bleach, or would result in any "definite tendency" to create a monopoly in the household bleach industry, in violation of Section 7 of the Clayton Act.

50. There is no proof that Procter's financial and economic strength, or advertising and promotional experience, or ability to acquire and retain shelf space have enhanced, in any substantial respect, the capacity of Clorox Chemical Company to compete in the liquid bleach field, or have been or will be utilized in any substantial way in the manufacture, distribution or marketing of Clorox liquid bleach.

51. There is no proof that the competitive position or market share of Clorox under respondent's control in the production and sale of household liquid bleach has been substantially enhanced over such position or market share prior to the acquisition, nor is there any evidence that any change in such position or market share has been to the detriment of actual or potential competition.

52. There is no proof that there is any increasing tendency of concentration of competitors in the household liquid bleach industry.

53. There is no proof that Clorox, through P & G advertising and sales promotion methods or devices or otherwise, has prevented, or has the ability to prevent, the entry of additional competitors into the household liquid bleach industry or has prevented, or has the ability to prevent, the competitors it already has from expanding by normal methods of competition.

54. There is no proof that the "fears" reflected in the testimony of officials of competing manufacturers and distributors of household liquid bleach as to the results of the acquisition were "well founded" or that the acquisition has resulted or will result in any injury to their businesses.

Respondent's Proposed Findings

55. There is no proof that since November 1958 The Clorox Company has used any "retaliatory tactics" in meeting sales promotions or test marketing of its smaller competitors.

56. Such evidence, as was in the record before the remand which the Examiner construed as giving rise to inferences that a lessening of competition might occur, is rebutted by the objective evidence as to the competitive situation four years after the acquisition, and such objective evidence compels the conclusion that the acquisition by Procter of Clorox Chemical Company has not resulted and will not probably result in any lessening of competition or tendency to monopoly in the liquid bleach industry—either nationally or in any section of the country.

57. By reason of all of the foregoing, the acquisition of Clorox Chemical by Procter does not violate the provisions of Section 7 of the Clayton Act and the complaint should be dismissed.

Respectfully submitted,

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Dated: January 15, 1962

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[Caption Omitted]

SECOND INITIAL DECISION

(Filed February 28, 1962)

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[Caption Omitted]

SECOND INITIAL DECISION

Everett F. Haycraft, Hearing Examiner.

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PRELIMINARY STATEMENT**A. THE PLEADINGS AND PROCEEDINGS.**

The Commission, on September 30, 1957, issued a complaint against The Procter & Gamble Company, an Ohio corporation, sometimes hereinafter referred to as P & G, with its principal office and place of business located in Cincinnati, Ohio, charging it with violation of Section 7 of the Clayton Act, as amended December 29, 1950, through the acquisition on August 1, 1957, of the assets, trademarks, business and goodwill of the Clorox Chemical Company, a Delaware corporation, sometimes hereinafter referred to as Clorox Chemical, with its principal office and place of business located in Oakland, California.

Specifically, the complaint alleges that the effect of the acquisition of the assets and business of Clorox Chemical, "may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of household liquid bleaches in the United States and in each of them."

More specifically it is alleged that the effect of the acquisition was the actual or potential lessening of com-

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petition and a tendency to create a monopoly in the following ways, among others:

1. In the production and sale of household liquid bleach.
2. The elimination of Clorox Chemical as an independent, competitive factor in the household liquid bleach industry.

3. Household liquid bleach producers may be unable to compete with the respondent due to one or more of the following:

- a. Respondent's market position.
- b. Respondent's financial and economic strength.
- c. Respondent's advertising ability and experience.
- d. Respondent's merchandising and promotional ability and experience.
- e. Respondent's 'full line' of cleansing and laundry products.
- f. Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space.
- g. Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability."

4. Enhancement of respondent's competitive position in the production and sale of household liquid bleach to the detriment of actual and potential competition.

5. The industry-wide concentration of the production and sale of household liquid bleach may be increased.

6. The respondent is given the facilities, the market position and the "dominant ability" to monopolize, or tend to monopolize, the household liquid bleach market.

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In its answer, filed November 4, 1957, respondent denied all charges of illegality contained in the complaint.

The taking of evidence commenced in Cincinnati, Ohio, on December 16, 1957. Additional hearings were held in San Francisco, Los Angeles, Chicago, Philadelphia, New York, Boston, Buffalo, Detroit, and Washington, D. C., at which testimony was taken in support of the allegations of the complaint. Counsel in support of the complaint closed their case in chief on August 26, 1958.

Counsel for respondent presented evidence in opposition to the allegations of the complaint at hearings held in Washington, D. C., on November 17-26, 1958, and January 5-9, 1959.

Rebuttal testimony was received in Washington, D. C., commencing January 26, 1959. The hearings were concluded on February 12, 1959, when each party stipulated that its case was closed. Proposed findings were filed by the opposing parties in May 1959, and oral argument was held on June 16, 1959. Numerous briefs have been filed both before and after the oral argument, the last one having been filed in November 1959. The record consists of approximately 6,300 pages of transcript and several hundred exhibits, many of which consist of several pages.

Consideration having been given to the proposed findings and all the reliable, probative and substantial evidence in the record upon all material issues of fact, law or discretion, the examiner was of the opinion that the material allegations of the complaint had been proven by substantial and reliable evidence, and that the Commission should take remedial action in the premises. Appropriate findings as to the facts, conclusions and order of divestiture were issued by the examiner on June 17, 1960.

Thereafter, an appeal was taken to the Commission from the initial decision and oral argument was had before the

Preliminary Statement

Commission. On June 15, 1961, the Commisison entered an order remanding the proceeding to the hearing examiner for the reception of such further evidence concerning the competitive effects of the aforementioned acquisition as may be offered in conformity with the views expressed in the accompanying opinion of the Commission. It was further ordered that after the receipt of such additional evidence, the hearing examiner should make and file a new initial decision on the basis of the entire record. The following statement was made in the order as the basis for the remand:

"The Commission having determined that the record as presently constituted does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition of Clorox Chemical Co. on competition in the production and sale of household liquid bleach, and being of the opinion that the record should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits."

In the course of the opinion, the following appears as further indication of the extent of the remand:

"The case will, therefore, be remanded to the hearing examiner for the reception of evidence relating to the competitive situation as it presently exists in the liquid bleach industry. This evidence should relate to events occurring subsequent to November 1958, and should include market share data in each of the geographical regions specified on page 17 of the initial decision, as well as information directed to more clearly delineating the production and merchandising facilities and techniques which have been utilized by Clorox under the control of respondent."

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Pursuant to the foregoing order of the Commission, hearings were held in Washington, D. C., on December 1, 1961, for the purpose of taking testimony and other evidence submitted by counsel in support of the complaint, and on December 12, 1961, at which testimony and other evidence was received in opposition to testimony presented by counsel in support of the complaint on December 1, 1961. At the December 12 hearing, both counsel rested and the hearing examiner closed the taking of testimony and allowed both counsel until January 15, 1962, within which to file proposed findings based on the testimony and evidence submitted at these hearings and both counsel were also allowed until February 1, 1962, within which to file reply, if desired.

B. STATEMENT OF THE ISSUES AND OPINION.

Section 7 of the Clayton Act, as amended December 29, 1950, provides in part as follows:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of any such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The House Report accompanying the bill amending Section 7, as above, stated:

"Under (Section 7) a merger or acquisition will be unlawful if it may have the effect of either (a) substantially lessening competition, or (b) tending to

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create a monopoly. These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act. Thus, it would be unnecessary for the Government to speculate as to what is in the 'back of the minds' of those who promote a merger; or to prove that the acquiring firm had engaged in actions which are considered unethical or predatory; or to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitors or fix prices."¹

It will be noted from the foregoing that among the first things to be determined in this case, and the necessary issues, are:

1. The Statutory "Line of Commerce" involved in the transaction.
2. The Statutory "Section of the Country" involved in the transaction.
3. The effect on competition in such "Line of Commerce" and/or such "Section of the Country."
 - a. Does the acquisition tend to substantially lessen competition, or
 - b. Tend to create a monopoly in the line of commerce or section of the country where the respondent and the acquired corporation are engaged in business.

In the Senate report accompanying the amendment to Section 7 of the Clayton Act in 1950, the following language is found:

"What constitutes a section (of the country) will vary with the *nature of the product*.* Owing to the dif-

¹ H. R. Report No. 1191 of 81st Congress, 1st Session, Page 8.

* Emphasis supplied.

Preliminary Statement

ference in size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition was based on miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product such as milk, and

... "Hence, an acquisition is not to be interpreted merely in terms of either its effect on competition or its tendency to create a monopoly *'in the Nation as a whole'*.* The act is to be violated if, as a result of the acquisition, there would be a substantial lessening of competition or a tendency to create a monopoly *in any section of the country.*"¹ *

Another issue is whether or not the acquisition involved in this case, a so-called conglomerate merger, comes within the language of the statute, since there was no competition between P & G and Clorox Chemical prior to the acquisition. The House Report (*supra*) states as follows:

"Because Section 7, as passed in 1914, prohibited, among other things, acquisitions which substantially lessened competition between the acquiring and acquired firms, it has been thought by some that this legislation applies only to the so-called horizontal mergers. But in the proposed bill, as has been pointed out above, the test of the effect on competition between the acquiring and the acquired firm has been eliminated. One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors. *But there is a second reason, which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and con-*

¹ Senate Report 1775, 81st Congress, 2nd Session, Pages 5 and 6.

* Emphasis supplied.

Findings As to the Facts

*glomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly."*¹ *

Consideration has been given to the proposed findings and all the reliable probative and substantial evidence in the record upon all material issues of fact, law or discretion, including the evidence received at hearings held pursuant to the Commission's order of June 15, 1961 remanding the proceeding to the Hearing Examiner for the taking of additional evidence. Each of those proposed findings which has been accepted, has been, in substance, incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected.

The examiner is of the opinion that the material allegations of the complaint have been proven by substantial and reliable evidence and that the Commission should take remedial action in the premises. Appropriate Findings as to the Facts, Conclusions and Order of Divestiture are hereinafter set forth.

FINDINGS AS TO THE FACTS**I. Description of the Respondent and the Industries In Which It Was Engaged In 1957.**

Respondent P & G and various of its subsidiaries in 1957 were engaged principally in the manufacture and sale in interstate commerce of soaps, synthetic detergents and cleansers. It also manufactured and sold some food products, including meat food products, paper products, shampoos, dentifrices and home permanents. P & G was, and now is, the largest producer in the United States of soap and synthetic detergent products, and one of the major

¹ Ibid, Page 11.

* Emphasis supplied.

Findings As to the Facts

producers in its other principal product fields. The more important consumer household brands manufactured by P & G and its subsidiaries are sold to retail and wholesale grocery and drug outlets, department stores and variety stores. P & G was, and now is, one of the leading national advertisers in the United States and expends large sums of money in advertising and promoting many of its products in the household soap, detergent, food and toilet goods fields. P & G's overall expenditures for advertising in the United States of approximately thirty-five products manufactured by it and sold under its brand names were somewhat in excess of \$79,000,000 for its fiscal year ended June 30, 1957. There is no evidence in the record relating to P & G advertising expenditures subsequent to that date.

As of June 30, 1957, P & G had total assets of \$688,272,623 and total capital and retained earnings of \$462,097,281. For the fiscal year 1957, consolidated net sales amounted to \$1,156,389,726, and consolidated net earnings were \$67,807,376.

As of June 30, 1961, P & G had total assets of \$1,022,525,434 and total capital and retained earnings of \$677,686,077. For the fiscal year 1961, consolidated net sales amounted to \$1,541,904,779, and consolidated net earnings were \$106,632,804.

Since 1946, P & G's net sales have increased approximately 400%, and total assets have increased more than 400%. A large percentage of this growth is attributable to the development of new products. For instance, it has developed and brought on the market a new detergent, a new deodorant toilet soap bar, two new brands of toothpaste, and an abrasiye cleanser, all of which have proved very popular. P & G's president testified that approximately 70% of P & G's household product volume comes from products not in existence in 1946.

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P & G has also grown by acquiring going businesses and, in so doing, entered new fields and diversified its operations. For instance, in August 1955 P & G acquired S. T. Young Foods, Incorporated, which manufactured peanut butter; in August 1956 P & G acquired the Duncan Hines prepared cake mixes from Nebraska Consolidated Mills, Incorporated, of Omaha; and in January 1957 it acquired Charmin Paper Mills, Incorporated, manufacturer of paper products.

The Duncan Hines and Charmin products were added to the P & G list of consumer brands during the fiscal year ended June 30, 1957. In P & G's annual report of 1957 the following statement appears:

"Procter & Gamble's technical knowledge and manufacturing experience fit very well into the development and production of these types of products. In addition, both prepared mixes and paper tissue products are low priced, rapid turn-over, household items sold primarily through grocery, drug and department stores—the type of goods which the company is accustomed to market."

A further explanation is made of such acquisitions in the following language by the P & G Board Chairman:

"Since our recent purchase of the Duncan Hines Cake Mix business, and our interest in the paper products field, it would be natural for any shareholder to ask, 'Why do we go into businesses like cake and other flour and shortening mixes, peanut butter and paper tissues?' Our answer would be simply that we feel *our experience and marketing skill* qualify us carefully to diversify our operations, and that by choosing subsidiaries well and applying Procter & Gamble's merchandising methods to related consumer products busi-

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nesses, we add to the stability and profits of the business." *

The Executive Vice President of P & G at the time of the acquisition of Clorox Chemical, in a press release, stated:

*"While this is a completely new business for us, taking us for the first time into the marketing of a household bleach and disinfectant, we are thoroughly at home in the field of manufacturing and marketing low priced, rapid turn-over consumer products." **

II. The Clorox Chemical Company.

The Clorox Chemical Company was, prior to August 1, 1957, a Delaware Corporation, with its office and principal place of business in Oakland, California, and was engaged in the production and sale in interstate commerce of 5¼% sodium hypochlorite liquid bleach and disinfectant under the trade name of "Clorox." At that time, and certainly since 1952, Clorox Chemical was the largest producer of household liquid bleach in the United States. It had thirteen plants for the manufacture and bottling of household liquid bleach, located at Atlanta, Georgia; Boston, Massachusetts; Camden, New Jersey; Charlotte, North Carolina; Chicago, Illinois; Cleveland, Ohio; Houston, Texas; Jersey City, New Jersey; Kansas City, Missouri; Los Angeles, California; Oakland, California; Seattle, Washington; and Tampa, Florida.

Net sales and net income of Clorox Chemical for the fiscal years ending June 30, 1952, through June 30, 1957 were as follows:

* Emphasis supplied.

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<i>Net Sales</i>		<i>Net Income</i>	
1952 \$23,625,026	1952 \$1,255,005
1953 \$27,714,435	1953 \$1,348,618
1954	.... \$30,284,650	1954	.... \$1,343,511
1955	.... \$33,874,181	1955	.... \$2,041,251
1956	.... \$36,409,197	1956	.... \$2,032,861
1957	.... \$39,999,114	1957	.... \$2,569,166

As of June 30, 1957, Clorox Chemical had total assets of \$12,629,425 and an earned surplus of \$7,127,015.

The foregoing net sales figures represent almost entirely sales of household liquid bleach which, with the exception of a small amount of industrial bleach, has always been Clorox Chemical's only product.

It will be seen from the foregoing table that the net sales of Clorox Chemical reflect a steady, continuous and substantial growth in each of the fiscal years from June 30, 1952, through June 30, 1957.

In each of the years during the period from August 1, 1952, through July 31, 1957, there was also a steady and continuous growth in Clorox Chemical's market share of all household liquid bleach sold in the United States through grocery stores. Such market shares were as follows:

<i>Year Ending July 31</i>	<i>Clorox Brand Share</i>
1953	45.3%
1954	46.4%
1955	47.1%
1956	47.8%
1957	48.4%

Clorox Chemical sold its product through approximately 80 distributors, acting as principals, to the grocery trade—shipments being made direct to the retail customer as well as to the distributor, with the freight paid by Clorox Chemical.

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Clorox Chemical's success in the household liquid bleach industry had been achieved through extensive national advertising which had made the name Clorox well-known and accepted in American households as a quality product at a reasonable price.

The record indicates that Clorox Chemical was generally considered the price leader in the household liquid bleach industry. While a few brands, such as Purex, Linco, Prescott, 101, Hilex, and Roman Cleanser, sold at substantially the same premium price as Clorox, most of the brands manufactured by regional manufacturers sold for less than Clorox. Most private label and local brands generally sold for even lower prices. There is evidence that in a few isolated regional situations, certain competitive bleaches have been sold at a higher price than Clorox.

Clorox Chemical spent approximately \$1,750,000 for newspaper advertising, \$560,000 for magazine advertising, \$1,150,000 for television, \$113,000 for radio, and \$145,000 for billboard advertising during the fiscal year ended June 30, 1957. It began to use TV spot advertising in July 1956, which was intended to add "extra impact to the tremendous selling support provided by Clorox national advertising."

During the period 1952 through July 31, 1957, Clorox Chemical had utilized no so-called consumer promotional devices or methods, such as the distribution of price-off coupons, free samples, premiums, contests or tie-in sales, although many of its competitors had utilized some or all of these devices.

Clorox Chemical commenced to use what is known as special spring and fall housecleaning campaigns in 1956. These campaigns were directed primarily to the grocer and offered nothing special to the consumer. These campaigns

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lasted approximately six weeks, the spring campaign beginning in March, and the fall campaign in September. They were continued during 1957, the fall campaign being announced in a letter to the trade dated July 31, 1957, just prior to its acquisition by P & G.

III. The Acquisition of Clorox Chemical.

Respondent considered entering the household liquid bleach market by purchasing the Clorox Chemical Company approximately two years prior to the date of acquisition. In a confidential study of that market, by employees of respondent P & G in October, 1955, it was reported that liquid bleaches would continue to dominate the market volumewise since they were by far the most economical for the consumer to use. It was believed at that time that the household liquid bleach market would continue to grow for the following reasons:

- "a. 75% of the homes now use a bleach.
- b. Younger women bleach more than do older women.
- c. Automatic washing machine homes use more bleach than do conventional washing machine homes."

It was estimated in this report that the total household liquid bleach market in 1955 amounted to about 44,000,000 (3-gallon case) cases, and the market was divided as follows:

"Clorox (National)	44%
Purex (Sectional)	16%
All others	40%"

This report, which was prepared by a man in the promotional department of respondent, recommended that the company should acquire the Clorox business rather than

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try to enter the market by introducing a new brand, or by trying to expand a sectional brand. This was because it was felt that the latter course would require "a very heavy investment" to achieve a major volume in the field. It was recommended that:

"taking over the Clorox business, however, could be a way of achieving a dominant position in the liquid bleach market quickly which would pay out reasonably well."

The report contained a history of the net sales and earnings of Clorox Chemical with the following comment:

"We understand that Clorox sells through a broker-jobber setup, and that while they are No. 1 nationally, there are many important markets where their share of the bleach market is quite low. We feel that with our sales, distribution and manufacturing setup, we could effect a number of savings that could possibly increase the net profit of their business considerably—say to a net profit of \$3,000,000 on net sales of \$33,000,000."

In a later report by another member of the promotional department of respondent P & G, dated February 28, 1957, it was definitely recommended that P & G purchase the Clorox Chemical Company at a price of approximately \$30,000,000 of P & G stock. Among the reasons for recommending the purchase were the following:

First, the total bleach market was then a "large and expanding one." Liquid bleaches account for approximately 95% of the total volume, and it was believed that the bleach market would continue to grow for the same reasons assigned in the previous 1955 report hereinbefore mentioned.

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Second, Clorox was the nation's dominant bleach brand, with a total market share, reported by Neilson, in excess of 42%, or approximately half of the total household liquid bleach market.

Third, it was unlikely that the growth of dry bleaches would cut into the liquid bleach volume for many years to come.

Other factors taken into consideration were as follows:

"We are advised that Clorox spent \$2,660,000 in the last half of 1956 for advertising, or at the rate of \$5,320,000 a year. We believe that *P & G advertising philosophies and economies* applied to an advertising expenditure of this size can be expected to further advance the Clorox business.*

"It is conceivable that the profitability of the Clorox business may be improved. Recognizing that Procter & Gamble overhead charges, if applied to the Clorox P & L statement, might appear to reduce the profitability or at least to off-set any economies under P & G operation, there remains such possibilities as a 5 cent to 10 cent increase in the price per case (using Clorox 12 quart case as a base), which could conceivably be accomplished without an increase in the retail price, thereby expanding profit.

"We may be able to derive additional value from the Clorox name for other new and related products, which may not perhaps be measurable in exact dollars, but should nevertheless be considered a value returned on the investment."

Pursuant to an agreement dated May 28, 1957, between Clorox Chemical and P & G, Clorox Chemical agreed to exchange and transfer substantially all of its assets and business as a going concern to P & G on the terms, con-

* Emphasis supplied.

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ditions and provisions set forth in said agreement, which provided, among other things, that the closing of such exchange and transfer, subject to prior approval by Clorox Chemical stockholders, would be August 1, 1957.

To implement the transaction, P & G caused a wholly owned subsidiary named The Clorox Company to be incorporated under the laws of the State of Ohio. On August 1, 1957, this subsidiary, pursuant to the plan of reorganization set forth in the said agreement, exchanged 639,578 shares of P & G's fully paid and non-assessable two-dollar par value common stock (about 3.1% of the issued and outstanding stock) for substantially all of the assets and business of Clorox Chemical as a going concern. Clorox Chemical was then dissolved and the P & G stock received by it was distributed among Clorox Chemical's stockholders. The market value of the P & G stock exchanged was approximately \$30,000,000.

IV. Household Liquid Bleach Is The Line of Commerce In This Proceeding.

The product involved in this case, is household liquid bleach, which quite uniformly consists of 5¼% sodium hypochlorite solution with 94¾% water. It is either manufactured from basic chemicals (chlorine and caustic soda) or it is converted by the producer from bleach concentrate by the addition of water.

Household liquid bleach is used by the housewife principally in the laundry as an adjunct to soaps and detergents to bleach cottons and fine fabrics. It is also used extensively as a germicide, to disinfect garbage cans, toilets, kitchen sinks, etc.

It is sold principally through grocery stores, in various sized glass containers, including pint, quart, half gallon

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and gallon bottles, packed in cases as follows: 24 pints, 12 quarts, 6 half gallons, and 4 gallons to a case, respectively.

It is contended by the respondent that the line of commerce involved in this proceeding should include dry bleach as well as liquid bleach, asserting that approximately 10% of the total household bleach market consists of dry bleach.

Dry bleach is not competitive with liquid bleach because, among other reasons, it has differing functional uses. Liquid bleaches are quicker and more thorough than dry bleaches, and they are considered more in the heavy duty category, while dry bleaches are in the light duty area. In addition, dry bleach is more expensive to use, is much less effective than liquid bleach for laundry purposes, and accounts for only about 5% of all laundry functions.

Clorox Chemical did not manufacture dry bleach, and the evidence indicates that dry bleach will not materially cut into the liquid bleach market in the foreseeable future or ever replace liquid bleach in the home.

It is, therefore, found that the line of commerce in this case is household liquid bleach.

V. The Sections of the Country and Competitors In Each Section.**A. THE SECTIONS OF THE COUNTRY INVOLVED HEREIN.**

There is a national market for household liquid bleach in the sense that it is universally sold throughout the United States in grocery and drug stores. However, this national market is made up of a series of regional and local markets, the geographical confines of which cannot be fixed with any exactitude. There are in the household liquid bleach industry a substantial number of small producers which are located and sell in various local or re-

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gional areas. The weight of household liquid bleach, packed in cases of glass or plastic containers for shipment, results in high freight costs, and necessarily restricts the region served by any one production facility. In the main, each producer markets its products in the region in which it has manufacturing facilities, and which it considers can be economically served by such facilities. In consequence, different competitive factors and conditions are to be found to some degree in each regional market.

Clorox Chemical was the only household liquid bleach manufacturer which sold its product throughout the United States. Purex Ltd., the second largest household liquid bleach producer, marketed its brand in areas of the United States containing approximately 48% of the population at the time of the acquisition of Clorox Chemical by P & G. In October 1958, Purex acquired the plants of John Buhl Products Company, a subsidiary of Sterling Drug, Inc., manufacturing and selling a brand of household liquid bleach known as "Fleecy-White," and, as a result, Purex now markets household liquid bleach in areas of the United States containing approximately 64% of the population. With the possible exception of one or two other producers, all of the other members of the industry sold only in smaller regional or local areas.

In all but two of those regional areas, Clorox Chemical, prior to the acquisition by P & G, was a strong competitive factor. However, in two of the regional areas one of the competitive manufacturers occupied a market position comparable to that of Clorox Chemical in the sale of household liquid bleach.

B. THE PRINCIPAL COMPETITORS IN EACH SECTION.

There is some conflicting testimony as to the actual number of household liquid bleach manufacturers in the United

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States. It was estimated by the president of respondent that there were between 100 and 200 such liquid bleach manufacturers. The president of Purex estimated there were approximately 40 to 50 such manufacturers who sell their products under their own label to grocery stores in competition with Clorox liquid bleach. The December 1955 edition of the Thomas Register of American Manufacturers contains the names of 20 companies known as liquid bleach manufacturers that were competitors of Clorox Chemical.

The following household liquid bleach manufacturers were the principal competitors of Clorox Chemical at the time of the acquisition:

1. *Purex Chemical Company*, hereinbefore mentioned, which had the largest distribution of household liquid bleach of any manufacturer except Clorox Chemical, sold its said product to customers in areas west of the Mississippi River and south of the Ohio River, plus portions of Wisconsin, Southern Illinois, and Southern Indiana. It did not sell in Pennsylvania, West Virginia, Virginia, the Carolinas, or Southern Florida. Since its acquisition in 1958 of the John Buhl Products Company, the manufacturer of "Fleecy-White" brand of household liquid bleach, it has added to its sales territory most of Virginia, West Virginia, Ohio, North Carolina, and parts of Michigan and Wisconsin.

2. *Roman Cleanser Company*, located in Detroit, Michigan, sold its household liquid bleach from its plants in Detroit; Griffin, Georgia; Tampa and Miami, Florida. Deliveries were made to customers located within a radius of about 150 miles of each plant. The territory generally covered by such sales are the States of Michigan, Ohio, part of Pennsylvania, parts of Indiana, Illinois, Georgia, Florida, and very little in Virginia and West Virginia.

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3. *Linco Products Corporation*, sold its household liquid bleach principally to customers in and around the City of Chicago where its factory is located. Its sales territory also included the States of Illinois, Indiana, Michigan, Wisconsin, and parts of Iowa and Ohio.

4. *The Hood Chemical Company*, with its principal place of business in Ardmore, Pennsylvania, sold its household liquid bleach produced at its plants in South Plainfield, New Jersey; Charlotte, North Carolina; Jacksonville, Florida; and Lisbon, Ohio, to customers in the sales areas surrounding the Cities of Philadelphia and Pittsburgh, Pennsylvania, the States of Florida, North Carolina, and South Carolina.

5. *Rose-Lux Chemical Company*, sold its household liquid bleach under the trade name or brand "Rose-X," manufactured in its factory located in Brooklyn, New York, to customers in the metropolitan area of New York City, including two counties in New Jersey, and one county in Connecticut.

6. *The J. L. Prescott Company*, with its factory located in Passaic, New Jersey, sold its "Dazzle" brand of household liquid bleach to customers in the States of Massachusetts, Connecticut, Rhode Island, and portions of Maine, New Hampshire, New Jersey, New York, Pennsylvania, and Maryland.

7. *The Savol Bleach Company*, from its factory in East Hartford, Connecticut, sold its household liquid bleach to customers located within a radius of 35 miles around Hartford.

8. *The Gardiner Manufacturing Company* sold its household liquid bleach "101" brand from its plant located in Buffalo, New York, to customers in western New

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York and western Pennsylvania, which included Erie and Bradford, Pennsylvania, Olean, Rochester, and Niagara Falls, New York, and points between those areas.

9. *The John Buhl Products Company*, hereinbefore mentioned, sold its "Fleecy-White" brand of household liquid bleach to customers in and around the City of Chicago, Illinois, where its factory was located, and in parts of Wisconsin, Michigan, Ohio, Iowa, Illinois, Indiana, West Virginia, Virginia, and North Carolina; and also in some portions of Kentucky, Tennessee, Alabama, Georgia, Texas, and Louisiana.

10. *Jones Chemicals, Incorporated*, sold its household liquid bleach under the trade name "Sunny Sol" from its factory in Caledonia, New York, to chain stores and jobbers in Utica, Binghamton, Norwich, and Albany, New York, and under the same trademark, it sold in bulk to franchised distributors in Buffalo, Rochester, Syracuse, Elmira, New York, and in Erie, Pennsylvania, who in turn sold to retailers in those areas.

11. *Lady's Choice Foods*, a corporation with plants located in San Francisco and Los Angeles, California, manufactured and sold household liquid bleach under the trade names "Saniclor" and "Hypro" to customers throughout the State of California, and portions of Arizona and Nevada.

12. *The No-Worry Chemical Company* manufactured a household liquid bleach at its factory in Newark, New Jersey, and sold it to customers in Essex and Hudson Counties, New Jersey, under the trade name "No Worry Bleach."

13. *B. T. Babbitt, Inc.*, whose principal household product is "Bab-O" also, since 1956 when it acquired Chemi-

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cals, Inc., manufactured household liquid bleach at its factory in Oakland, California, under the trade name "Vano," which it sold to customers in the immediate area around San Francisco and Oakland, California.

14. *The Hilex Liquid Bleach Company*, with its factory located in Minneapolis, Minnesota, sold household liquid bleach to customers in the States of Minnesota, North and South Dakota, and part of Colorado.

15. *The Texize Chemical Company* is listed in Dun & Bradstreet as a manufacturer of household bleach having a financial strength of more than \$1,000,000. It is located in Greenville, South Carolina, and apparently sold its products in that general area, although the record does not contain detailed information with respect to the business of this company. It is of sufficient importance, however, that the Nielsen Food Index includes it in household liquid bleach market studies that have been made.

In addition to the foregoing-named manufacturers, the record contains evidence of another local company in New England, the Sunlight Chemical Corp., of East Providence, Rhode Island, engaged in the manufacture of a line of chemicals for household cleaning and laundry in the home, including a household liquid bleach.

From the foregoing facts, it is found that the sections of the country involved in this case are the United States as a whole, as well as those local and regional markets within the United States where Clorox is sold in substantial competition with one or more other household liquid bleach producers, and as recognized by the A. C. Nielsen Company Marketing Service to be as follows: New England, Metropolitan New York City, Middle Atlantic, East Central, Metropolitan Chicago, West Central, Southeast, Southwest and Pacific.

*Findings As to the Facts***VI. Clorox's Share of the Household Liquid Bleach Market in the United States and in Certain Sections of the Country at the Time of the Acquisition and as of June-July 1961.**

The following Table I sets forth the market share of various brands of household liquid bleach, on a consumer dollar basis, for the United States as a whole, and for certain regions such as New England, Metropolitan New York, Middle Atlantic, etc., as reported by the A. C. Nielsen Company in its bi-monthly reports covering the two-month periods June-July 1957 and June-July 1961.

It will be noted from the foregoing table that the sales of Clorox, during the period June-July 1957 represented 48.8% of the total sales of household liquid bleach in the United States, and that such sales had increased to 51.5% during the period of June-July 1961. It will also be noted that Clorox's nearest competitor, Purex, which ranked second in sales nationally with a market share of approximately 15.7% in the June-July 1957 period, decreased to approximately 14.2% in the June-July 1961 period, and that although Purex acquired the fourth ranking competitor, "Fleecy-White" in October 1958, the combined sales of Purex and "Fleecy-White" in 1961, which amounted to approximately 18.2% of the national market, represented barely one-third of the amount of household liquid bleach sold by Clorox during that period. The third largest seller of household liquid bleach, Roman Cleanser, whose sales of this product in the 1957 period represented approximately 5.9% of the national market, had decreased to approximately 4.1% in the 1961 period; such sales amounting to less than one-tenth of Clorox's sales during this latter period. The fifth ranking brand in 1957, Hilex, with approximately 3.3% of the national market was not shown

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TABLE I

MARKET SHARES
BI-MONTHLY PERIODS, JUNE-JULY 1957 & JUNE-JULY 1961
PERCENT OF TOTAL SALES, LIQUID BLEACH ON CONSUMER
DOLLAR BASIS

Purex & Others ²															
		Clorox		Purex		Fleecy White		Fleecy White ¹		Hilex	Linco	Roman Sani- Cleanser Clor		Texize	Others ²
Total	1957 1961	48.8 51.5	15.7 14.2	4.0 4.0	19.7 18.2	3.3 2	2.1 1.5	5.9 4.1	0.8 2	0.5 1.1	18.9 23.6				
United States															
New England	1957 1961	56.0 67.5	...	...	...	2	...	...	2	...	44.0 32.5
Metropolitan New York	1957 1961	64.3 65.4	...	...	...	2	...	...	2	...	35.7 34.6
Middle Atlantic	1957 1961	71.6 71.7	...	...	...	2	...	...	2	...	28.4 28.3
East Central	1957 1961	42.4 46.5	5.0 4.8	5.2 7.0	10.2 11.8	0.9 2	0.7 0.8	27.2 21.4	2	0.5	18.6 19.0				
Metropolitan Chicago	1957 1961	28.6 32.4	0.1 ...	18.9 20.5	19.0 20.5	0.1 2	50.3 35.9	...	2	...	2.0 11.2				
West Central	1957 1961	34.5 41.7	20.6 18.7	9.0 9.2	29.6 27.9	25.8 2	2.1 0.9	0.1	2	...	8.0 29.4				
Southeast	1957 1961	52.6 54.2	16.0 12.5	5.7 4.2	21.7 16.7	2	...	5.3 3.0	2	3.1 5.6	17.3 20.5				
Southwest	1957 1961	48.4 46.5	39.6 38.0	3.9 2.7	43.5 40.7	2	...	...	2	0.3	8.1 12.5		
Pacific	1957 1961	39.2 38.0	42.4 38.6	...	42.4 38.6	2	...	...	2	...	12.4 23.4		

¹ Purex acquired Fleecy-White in October 1958.

² Hilex and SaniClor included in "All Others" in 1961.

... Indicates no sales in the area.

SOURCE: CX 325, p. 77; CX 721 Z-38-Z-44.

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separately in the June-July 1961 Nielsen report, but was included in the "All Others" category, as was the Sani-Clor brand whose sales represented less than 1% of the national sales in 1957. Two other companies whose brands of liquid bleach are not named in the report but are included in the "All Others" category are the Hood Chemical Company and the J. L. Prescott Co. each of whose sales of household liquid bleach for the year 1957 exceeded the sales of the Linco brand but were less than those of Roman Cleanser.

It is noted that Clorox not only increased its market share of the total sales of household liquid bleach in the United States as a whole between the June-July 1957 and the June-July 1961 periods from 48.8% to 51.5% as indicated above, it also increased its market share even more substantially, at the expense of its competitors, in at least four of the nine sections of the country covered in the accompanying table; namely, New England, East Central, Metropolitan Chicago and West Central. In the New England region, Clorox's increase in its market share was particularly significant, having risen from 56% in the 1957 period to 67.5% in the 1961 period, an increase of 11.5 percentage points in the four year period since the acquisition of Clorox by P & G., while the market share of all other household liquid bleach producers in that area decreased from 44% to 32.5%. During this same period, Clorox's market share increased in the East Central region from 42.4% to 46.5%; in the Metropolitan Chicago area from 28.6% to 32.4%; and in the West Central region from 34.5% to 41.7%. Also during this same period, the market share of Purex and "Fleecy-White" combined was decreasing in four of the six regions in which they operated, namely: West Central, from 29.6% to 27.9%; Southeast, from 21.7% to 16.7%; Southwest, from 43.5% to 40.7%; and Pacific 42.4% to 38.6%. The increase in

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market share of the combined Purex, "Fleecy-White" sales during this period in the other two regions was insignificant, amounting to only 1.6 percentage points in one region and 1.5 percentage points in the other, namely, East Central and Metropolitan Chicago, respectively. The market share of Roman Cleanser, the next largest competitor of Clorox was also decreasing during this same period from 5.9% to 4.1% in the United States as a whole, and from 27.2% to 21.4% in the East Central region, and from 5.3% to 3% in the Southeast. In the only other area in which Roman Cleanser was sold, the West Central region, it showed a market share of only 0.1% in the 1961 period where it apparently had no sales in the 1957 period.

The market share of Clorox in the United States as a whole and in the nine sections of the country reflected in Table I above is shown for the bi-monthly periods June-July 1957 and June-July 1961 on a Consumer Dollar Basis, and, as indicated in the preceding discussion, shows an increase of 2.7 percentage points. Respondent's Exhibit 135 shows that Clorox's average annual market share, on the same Consumer Dollar Basis, increased 3.5 percentage points from August 1, 1957 to August 1, 1961 and Respondent's Exhibit 134 shows that Clorox's average annual market share, on a 32 oz. Equivalent Unit Basis, increased 3.3 percentage points during the same period of time. It will also be noted that, while Table I shows an increase in Clorox's market share in the New England region from the June-July 1957 period to the comparable 1961 period of 11.5 percentage points, Respondent's Exhibit 136 shows that Clorox's average annual market share in this region increased 15.5 percentage points from August 1, 1957 to August 1, 1961. Respondent's Exhibit 136 also shows somewhat greater increases in three of the other regional markets than the increases shown in those

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markets in Table I, and lesser increases in three of the remaining regional markets.

VII. Some Household Liquid Bleach Manufacturers Sold A Portion Of Their Output To Grocery Chains For Resale Under Private Brand Labels.

Respondent introduced into evidence a list of more than 200 private brand labels of household liquid bleaches being manufactured and sold.* It appears, however, that the household liquid bleach represented by these 200 odd private brand labels, was manufactured by only 54 manufacturers or suppliers. One label, that of Safeway Stores, represented a private brand manufactured by Safeway, and not by any other manufacturer. Of the 54 manufacturers, six have been mentioned hereinbefore as competitors of Clorox Chemical at the time of the acquisition.

The record indicates that certain of the testifying liquid bleach competitors of the respondent manufactured household liquid bleach for sale by others under private brand labels, in addition to manufacturing and selling bleach under their own brand names. Some of such competitors, and the number of private brand labels of household liquid bleach manufactured by them, for sale by others, were as follows: Purex—34; J. L. Prescott Company—41; and Hood—7. Other competitors, hereinbefore mentioned, which also manufacture private brand labels for sale by others are Lady's Choice Foods, Linco Products Corporation, and Roselux Chemical Company. The following named household liquid bleach producers apparently do not manufacture private brand labels: No-Worry Chemical Company; Sunlight Chemical Company; Savol Bleach Company; and Gardiner Manufacturing Company. The Jones Chemi-

* Respondent's Exhibit 69 A-Z.

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cal Company began to sell household liquid bleach under a private brand label to a chain store in 1958.

The record does not contain any figures with respect to volume, but from the testimony of officials of these companies it appears that the Hood Chemical Company and the J. L. Prescott Company sold a substantial portion of their household liquid bleach to chain stores under private brand labels. The Linco Products Corporation sold about 12% of its volume to chain stores under private brand labels during the past few years, while the sales of household liquid bleach of other producers to the chain stores under private labels were *de minimis*. There is not sufficient evidence in the record to determine or find that the sale of private brand labels of household liquid bleach to grocery chain stores has increased since the year 1955.

Except for the Purex Company, the known manufacturers of private brand label liquid bleach for chain stores are not themselves important factors in the household liquid bleach industry, from the standpoint of their volume of sales. For instance, the combined total sales of such product by Hood Chemical and J. L. Prescott do not represent more than 5% of the industry. It also appears from the record that most of Hood Chemical Company sales of private brand label liquid bleach to chain stores was in the metropolitan New York area; the Linco Product Corporation in the Chicago metropolitan area; and most of J. L. Prescott Company's sales under private brand labels were in and around Boston, Massachusetts, and in the New York City metropolitan area.

Furthermore, it will be noted that in the table appearing on page 19 hereof, containing Neilsen data for the two-month period, June-July 1957, the respective percentages of sales by the different manufacturers do not include their sales of private label brands. However, such sales are

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included under the heading "All Others" which for those two months were less than 19% throughout the United States which, of course, would include, in addition to private label brands, all household liquid bleach sold throughout the country by all other manufacturers not listed in the table, including the J. L. Prescott Company and the Hood Chemical Company.

In view of the foregoing, it is found that the volume of sales of liquid bleach under private brand labels to grocery chains is not a substantial competitive factor in the household liquid bleach industry.

VIII. Respondent's Market Position In The Soap, Detergent, and Abrasive Cleanser Markets.

According to Nielsen Food Index reports, P & G is the leading producer in the United States of soap and synthetic detergents, and is one of the two leading producers of abrasive cleanser products. In 1957, P & G sales of packaged detergents in grocery stores was approximately 54.3% of total value on a consumer dollar basis, and 55% on a consumer unit basis, of the total national sales of such products. P & G consumer sales of toilet soaps in grocery stores in 1957 accounted for approximately 31.2% of total sales on a dollar basis and 37.3% on a unit basis of total national sales.

In the abrasive cleanser grocery store consumer sales market, sales of P & G's "Comet," on a dollar basis, represented approximately 36.5% of the national market in February and March 1958.

IX. P & G's Selling and Merchandising Methods.**A. METHOD OF DISTRIBUTION.**

P & G sells all its products, except Clorox, through a subsidiary, Procter and Gamble Distributing Company, which

Findings As to the Facts

has its own salesmen who call on wholesale jobber and retail outlets in the grocery, drug, department, and variety store fields.

The P & G sales force is divided into sales departments or divisions, each division selling a line of closely related products. For instance, the Case Soaps Sales Department sells all P & G packaged household soaps, cleansers, and synthetic detergents. The Case Food Sales Department sells P & G household edible products, including the acquired Duncan Hines and Big Top products. The Toilet Goods Sales Department sells the toiletries products manufactured by the Company, which includes shampoos, home permanents, and dentifrices. There is also a division which handles paper products.

P & G has approximately 1800 salesmen selling its products, and all of P & G sales personnel, practices and policies are under one man, the P & G Vice President of Sales.

B. SHELF SPACE IN GROCERY STORES.

The obtaining and retention of adequate shelf space in retail outlets, particularly in self-service grocery stores, is a fundamental objective of P & G salesmen. In January 1957 P & G inaugurated a "Chain Supermarket Retail Operation" devoted exclusively to shelf space. This program basically sought to realign soap, detergent and cleanser shelf space by grouping products into departments, and dividing said departments into proper classifications, allotting shelf space in ratio to sales movement.

There is an acute shortage of shelf space for all products, including respondent's, in the nation's grocery stores because of the greatly increased number and types of items carried by grocers in recent years. Adequate shelf space today is one of the things manufacturers compete for in grocery stores, especially in the larger supermarkets.

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Each P & G salesman, in addition to selling his line of P & G products, is responsible for obtaining advertising and other merchandising support from his customers, and for obtaining retail store shelf and display space for P & G products.

According to the President of respondent: "It's one of the salesman's normal duties to make sure to try to secure adequate shelf space for our brands."

Shelf space is generally allocated by grocers on the basis of the sales movement of a product, and the reputation and merchandising ability of the manufacturer of the product. As one liquid bleach manufacturer witness testified:

"Well, the allocation of shelf space in the grocery stores is controlled by competitive factors that were previously recited; the amount of advertising, the amount of promotion, whether or not the product is being couponed or sampled; what sort of consumer promotion might be offered, how much sales help is offered the store manager in re-allocating or re-arranging shelf space, all these things have a factor in determining which product gets the maximum shelf space."

Another chain store grocer witness testified that in allocating shelf space the store owner takes into consideration such factors as advertising, promotion, and the character of the firm that is promoting the product so as to know whether or not it can carry out its promises.

C. ADVERTISING PROGRAMS.

Sales movement of products, including respondents, in grocery stores is based primarily on the ability of the producer to advertise and promote its products. Grocers desire "pre-sold" products which they do not have to advertise or promote themselves. "P & G brands are pre-sold through extensive advertising."

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A chain store grocer witness testified that consumer acceptance is obtained, "by consistent advertising, radio, television. You name it. They could have many other gimmicks that are paramount to the supermarket industry, not particularly as to bleach or soaps. There are just any number of items that would cause a product to move."

As hereinbefore indicated, P & G is one of the nation's largest advertisers, having spent at least \$79,000,000 to advertise its products in the fiscal year ended June 30, 1957, and approximately \$82,500,000 for that purpose during the calendar year 1957.

Its principal soap and detergent competitors, Colgate-Palmolive, and Lever Brothers, spent approximately \$37,000,000, and \$24,000,000, respectively, during 1957 on national advertising. Purex, the principal competitor of respondent in the household liquid bleach business, spent approximately \$3,000,000 in national advertising during the same year.

P & G uses television spot announcements extensively in advertising its products. In 1957 it ranked first in the nation as to amounts expended in this manner, having spent approximately \$25,000,000 compared to approximately \$8,000,000 expended by each of its principal competitors, Colgate-Palmolive and Lever Brothers for this type of advertising.

P & G also uses television programs extensively in advertising its products. It also ranked first in the nation in 1957 on amounts expended in this medium, having expended approximately \$47,000,000. Colgate-Palmolive, its nearest competitor, spent approximately \$19,000,000 and Lever Brothers spent approximately \$16,000,000 for this type of advertising during this period.

The above amounts expended by P & G on television advertising alone indicate the advertising strength of the respondent.

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P & G also utilizes radio, newspapers, and magazines extensively in advertising its products, and ranks high in the nation in the last two of these advertising media. It spent substantially more money in advertising in magazines in 1957 than any other detergent producer, and ranked fourth in the nation in magazine advertising.

Discount rates are available to large advertisers which can reduce their advertising cost by as much as 30% (or permit them to purchase substantially more advertising for the same amount of money expended). To earn these discounts, large advertisers may, as P & G does, combine their advertising on a given medium of all their products. This makes the pro-rata cost per product far less than the amount required to be paid by the one-product company. Even a company with many products cannot earn discounts comparable to those of P & G if their combined amount of advertising is insufficient to qualify for a maximum discount.

D. SALES PROMOTION METHODS.

In fiscal 1957 respondent P & G charged to profit and loss for sales promotion more than \$47,000,000, which was approximately 5% of the amount of its net domestic sales. In conjunction with its advertising, P & G has promoted its household products by offering to the consumer such promotions as:

1. "Two-for-one" price sales.
2. Special packs wherein a small size is given free or at a reduced price with the purchase of the attached larger size or the entire pack price is reduced.
3. Free samples mailed or delivered to the consumer's residence..
4. Price-reducing coupons mailed to or delivered to the consumer's home, alone or packaged with free samples.

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5. Reduced consumer prices on quantity purchases.
6. Free or reduced price merchandise premiums attached to the P & G product or to be sent for by the consumer.
7. Contests with cash and merchandise prizes for the consumer.
8. Cross-couponing of P & G products and of P & G and other nationally known related products in that a price-reducing coupon for one product will be packaged in another P & G product.
9. Combining several of its products in a joint promotion, utilizing combinations of promotions hereinbefore mentioned.
10. Combinations of promotions hereinbefore mentioned for a single product.

E. P & G's "COMET" ADVERTISING AND SALES PROMOTION CAMPAIGN.

An example of the effectiveness of P & G's advertising and sales promotion campaigns is found in the "very successful" introduction and customer acceptance of its household cleanser "Comet." In the spring of 1957 respondent P & G introduced nationally its "Comet" brand of abrasive cleanser containing a bleach, with a national advertising campaign, after test marketing in selected areas, utilizing radio, television, newspaper, and magazine advertising, coordinated with extensive consumer promotions. From sometime in 1956 through October 1957, over a period of not more than 22 months, P & G spent for the direct advertising and promotion of "Comet" approximately \$7,200,000. Of this amount, approximately \$4,400,000 was spent in the first ten months of 1957 alone on "Comet" advertising.

As a result of the foregoing campaign, "Comet," according to Neilsen Food Index, steadily and consistently increased its market share, until by the last bi-monthly period of record herein (February-March, 1958) it had

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attained 36.5% of the national market of all scouring cleansers sold in grocery stores, and was within .4% of tying "Ajax," the leader in this field, for the number one rank. This position was gained by P & G within a period of approximately 20 months, from August 1956 to March 1958.

X. Changes Made By P & G Subsequent To The Acquisition of Clorox Chemical.

A. AS TO MANAGEMENT PERSONNEL OF CLOROX.

At the time of the acquisition, respondent P & G took over active control of the Clorox Chemical Company and installed its own personnel in key and controlling policy making positions. For example, Mr. Fred Brown, a veteran of 45 years with P & G, formerly in charge of all P & G domestic manufacturing, became Executive Vice President and General Manager of Clorox, reporting directly to Mr. Morgens, the President of both P & G and Clorox. Mr. Brown replaced the former President of Clorox Chemical, Mr. W. J. Roth, who was retained in a consulting capacity only.

P & G also transferred three other men of staff level at the time of acquisition to key positions with the Clorox Company. One, a marketing specialist with P & G who had been responsible for the promotion of several P & G brands, including "Tide," was made a marketing staff associate; another, a manufacturing specialist, became a manufacturing staff associate, reporting directly to Mr. Brown; and a third was placed in charge of Clorox's laboratory controls and the technical phases of its business. Also, in January 1958, a former P & G district manager of case soap sales was made Pacific Coast Division Sales Manager of the Clorox Company.

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In view of P & G's wide and successful experience in marketing its products, its technical know-how, together with its financial resources, these changes in the management of Clorox will result in substantial advantages to P & G in the marketing of Clorox liquid bleach.

B. AS TO PLANT OPERATIONS.

P & G closed down the Kansas City, Missouri, Clorox Chemical Company plant shortly after the acquisition, and is producing Clorox in a building on its own Kansas City, Kansas, property, with P & G personnel. This action was taken in the interest of economy. Rather than to have two plants manufacturing in the same area, it was decided to combine that production in one plant.

The Boston plant of Clorox Chemical was also closed down because it was thought that the Eastern territory could be supplied more economically from the Jersey City, New Jersey, Clorox plant.

C. AS TO SALES PROMOTION CAMPAIGNS.

Respondent P & G has added promotions to Clorox merchandising programs using price-off labels, free premiums, price-reducing coupons, and reduced-price premiums, coordinated with advertising in selling Clorox in selected areas and nationally.

Examples of such promotions include merchandise premiums and special Clorox labels, usually during spring and fall housecleaning drives. One such brochure urges merchant support and stresses the coordinated advertising support in the same manner as is done for other P & G products.

A premium offer of an ironing board cover was made in the southeastern United States in November 1957, in

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Erie, Pennsylvania, in January and February 1958, and in June 1958, in the southwestern Sales Division of P & G.

A premium pack of a dishcloth attached to a bottle of Clorox was also used in Los Angeles in June 1958.

This change to consumer promotion was decided upon by The Clorox Company as early as October 7, 1957.

In the spring of 1958, in the so-called "Clorox Spring Housecleaning Bee," consumer promotions were featured, such as an ironing board cover for 50 cents and a Clorox label.

Also in June 1958, a 5-cent price-off labels on gallons were used in metropolitan Chicago, which includes northern Illinois and a part of Wisconsin. Other price-off labels were used in Detroit, Nashville, Chattanooga, and San Francisco between February and July 1958.

The evidence introduced at the hearings held on December 1st and 12th, 1961, pursuant to the order of the Commission entered on June 15, 1961, remanding this proceeding to the Hearing Examiner for the reception of further evidence, clearly shows that respondent substantially increased the promotional activity with respect to Clorox, its acquired liquid bleach product, during the period July 1958 through July 1961. Such evidence shows that respondent used a total of about seventy promotions during that 3-year period at a total cost of approximately \$1,550,000 for the promotion of Clorox. This amount is in addition to the \$400,000 which respondent had budgeted immediately after the acquisition for the fiscal year ended June 30, 1958, for promotional expenditures of this product.

Prior to the acquisition of Clorox Chemical by P & G, the former company had not used consumer promotions for a number of years.

The evidence further shows dramatically that the market impact of the P & G-Clorox promotions was immediate

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and indicates that they were responsible, at least in part, for reversing the trend of Clorox's diminishing market share growth under the ownership of Clorox Chemical Co.

The following table shows the market share of Clorox and the annual changes therein, of the total sales of household liquid bleach in the United States, moving through grocery stores, for each of the four years preceeding the acquisition and each of the four years following the acquisition on both a 32-ounce Equivalent Unit Basis and on a Consumer Dollar Basis, together with the total annual expenditures by P & G for the promotion of Clorox.

TABLE II
*Clorox Market Share and Annual Changes
Household Liquid Bleach and
Promotional Expenditures*

Year Ended July 31	32 Oz. Equivalent Unit Basis		Consumer Dollar Basis		Promotional ^o Expenditures
	Clorox Share	Change	Clorox Share	Change	
<i>Prior to Acquisition</i>					
1953	41.4	....	45.3	....	1
1954	43.0	+1.6	46.4	+1.1	1
1955	44.0	+1.0	47.1	+0.7	1
1956	44.8	+0.8	47.8	+0.7	1
1957	45.3	+0.5	48.4	+0.6	1
<i>Subsequent to Acquisition</i>					
1958	45.8	+0.5	48.7	+0.3	\$400,000 ²
1959	46.8	+1.0	50.1	+1.4	\$520,300
1960	48.8	+2.0	51.8	+1.7	\$648,800
1961	48.6	-0.2	51.9	+0.1	\$379,800

¹ No Consumer promotions by Clorox Chemical Co.

² Budgeted by P & G for Clorox promotions for fiscal year ended June 30, 1958.

SOURCE: RXs 134A, 135A and CX 718A-F.

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It will be noted from the foregoing table that on both the 32 oz. Equivalent Unit Basis and the Consumer Dollar Basis, while Clorox's market share shows an increase every year from fiscal 1953 through fiscal 1961, the *trend* of the change in Clorox's market share shows a definite *declining trend* each year from fiscal 1953 to the date of acquisition, namely from +1.6 to +0.5 on the Unit Basis and from +1.1 to +0.6 on the Consumer Dollar Basis, during which time Clorox Chemical used no customer promotions and had no promotional expenditures. On the other hand, in fiscal 1958, the first year after the acquisition, when P & G budgeted \$400,000 for promotional expenditures, the trend of the change in Clorox's market share leveled off and then in the following two years, fiscal 1959 and 1960, when Clorox's promotional expenditures increased to \$520,300 and \$648,800, respectively, the change in Clorox's market share shows a decided upward trend from +0.5 to +2.0 on the Unit Basis and from +0.3 to +1.7 on the Consumer Dollar Basis. In fiscal 1961, the change in Clorox's market share shows a definite reversal, although its actual market share shows only a slight decline of two-tenths of one percent on the Unit Basis and a slight increase of one-tenth of one percent on the Consumer Dollar Basis. In this connection, it is noted that P & G decreased its promotional expenditures materially in that fiscal year to \$379,800 from \$648,800 in fiscal 1960.

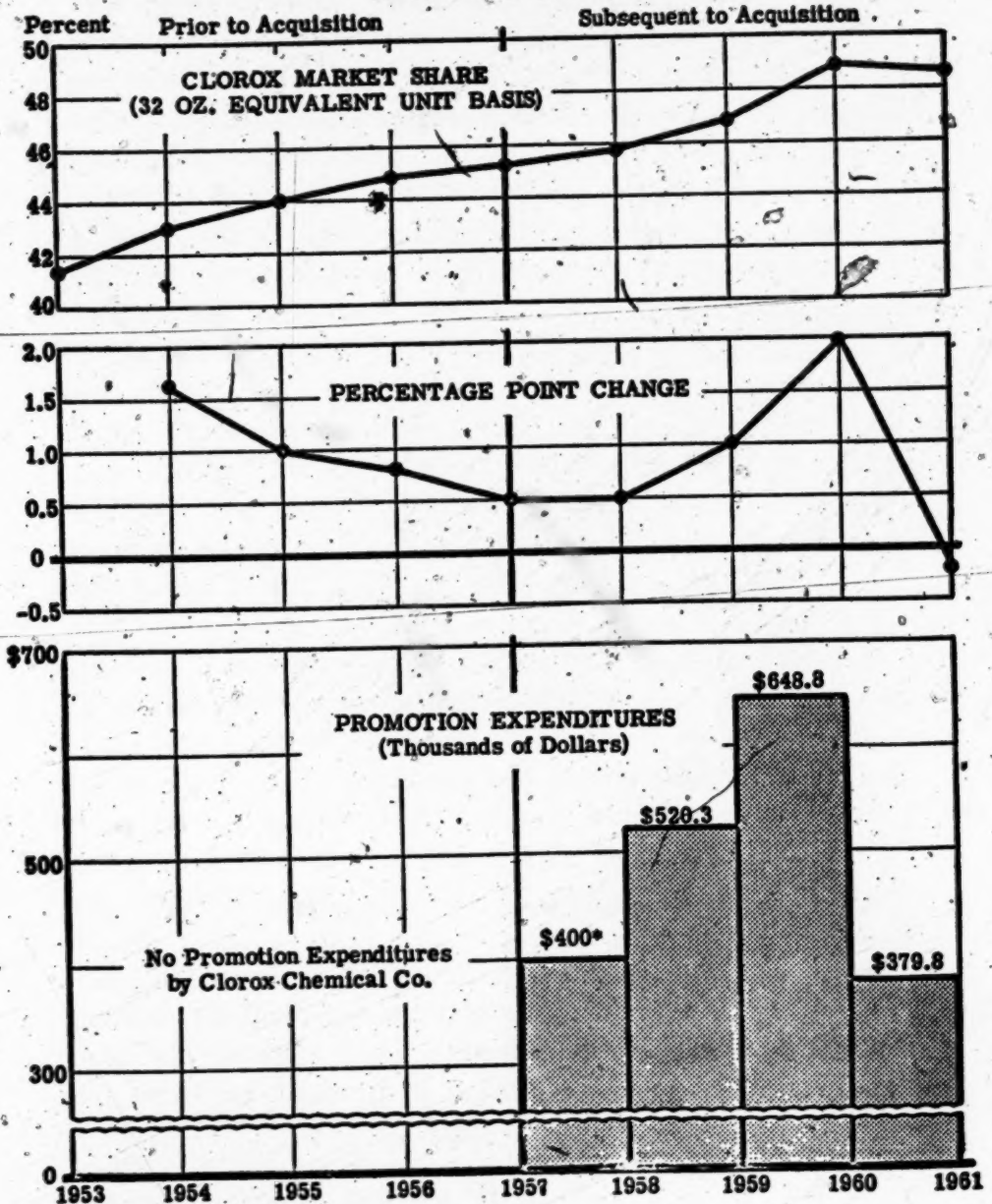
The following graph shows visually the correlation between Clorox's market share and the trend of the change therein from fiscal 1953 through fiscal 1961 on the one hand, and the amount allocated to promotional expenditures during that period of time.

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A CORRELATION OF CLOROX MARKET SHARE AND ITS PERCENTAGE POINT CHANGE WITH EXPENDITURES FOR PROMOTIONS

(Years End July 31)



*Budgeted for fiscal year ended June 30, 1958,

SOURCE: CX 134A, 718A-F,

Findings As to the Facts

The respondent contends in its Proposed Findings filed May 8, 1959, (page 91), that in the case of established products, such as Clorox liquid bleach, promotions may result in temporary gains in market share which, following the promotion, recede to their former level. However, the evidence in this case does not support this contention, as discussed in the immediately preceding paragraphs and reflected in the graph correlating Clorox's market share and its percentage point changes with its expenditures for promotions, on page 33 above. Another instance where evidence of probative value is available which relates the effect of a Clorox promotion directly to market share, (Erie, Pa., area, CX 450) Clorox's market share increased from 49% of the market during the period October 14 to November 11, 1957, (the period immediately preceding Clorox's "Money Saving Clorox Special" promotion on November 25, 1957, and followed by other Clorox promotions in that area in January and February 1958) to 63% in the period December 12, 1957 to January 6, 1958.

Although Clorox's market share leveled off after these promotions to 52.9% of the Erie market during the period February 3-March 3, 1958, it retained a gain of almost 4 percentage points in market share in this area. During this same period, the market share of one of its principal, but smaller competitors, Gardiner Manufacturing Company, with its 101 Brand, was decreasing from 25.2% to 22.3% of the market, and "All Other" brands were decreasing from 18.9% to 17.7%.

Furthermore, if the respondent's contention is correct, that promotions result in only temporary gains in market shares and then recede to their former level, it is inconceivable that Clorox would earmark \$400,000 of its first

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advertising budget after the acquisition and spend in excess of \$1,500,000 in the three succeeding years for such "ineffective" promotions.

D. AS TO ADVERTISING.**1. In Magazines.**

The Clorox Company, under P & G control, made a number of changes in the magazine advertising as used by Clorox Chemical Company, not only in the kind of magazines used, but in the type of ads appearing therein. For example, in February 1958, Clorox began the use of *monthly full page black and white ads* in some magazines in which Clorox Chemical had run *smaller color ads every other month*. Several magazines that had been used for advertising by Clorox Chemical were dropped entirely and the advertising in others, such as certain farm magazines, was reduced. These latter changes would appear to be consistent with P & G's general policy, as testified to by its advertising manager, of advertising in magazines with national circulation.

2. On Radio.

The Clorox Company, under control of respondent P & G, has doubled the amount of time purchased in television spot announcements of Clorox, compared to the record of Clorox Chemical, and placed less emphasis on radio in conformance with the P & G policy.

Also consistent with P & G policy, subsequent to the acquisition of Clorox Chemical Company, spot announcements on some independent, unaffiliated radio stations were terminated, and were switched to net-work stations which generally offered more listening audience. After the acquisition, 34 radio stations were dropped from Clorox

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advertising, of which 27 were independent stations, unaffiliated with a net-work. One new station was added.

3. On Television.

Clorox has been advertised, since the acquisition, on spot television in new markets wherein the Clorox Chemical Company was not using spot television. Also television spot advertising has been increased in other markets, wherein the Clorox Chemical Company had done very little television spot advertising.

While Clorox dropped or decreased TV spot advertising in a few markets, that had been used by Clorox Chemical Company prior to the acquisition by P & G, it added or increased its TV spot advertising after the acquisition in a substantially larger number of markets, either not used at all, or used to a more limited degree by Clorox Chemical Company.

The monthly average number of seconds of TV spot advertising used by Clorox Chemical Company in TV markets decreased or dropped by Clorox after the acquisition were 5,956.7, while such average used by Clorox in such markets after the acquisition was 3,597.5, or a decrease of only 2,359.2 seconds. On the other hand, the monthly average number of seconds on TV spot advertising used by Clorox in new or increased TV markets after the acquisition was 96,660 seconds, as compared to a monthly average of 43,277.4 seconds used by Clorox Chemical Company in such territory prior to the acquisition, or an increase of 53,382.6 seconds.

Thus, the total monthly average number of seconds of TV spot advertising used by Clorox Chemical Company before the acquisition, in both decreased and increased TV markets, was 49,234, whereas such average used by Clorox

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after the acquisition in such markets was 100,257, or a net increase of 51,023 seconds. The following tables set forth in detail the monthly average, before and after the acquisition, in (1) New or Increased TV Markets, and (2) Decreased or Dropped TV Markets.

TABLE III

(CX-545)

New or Increased TV Markets After the Acquisition

(MONTHLY AVERAGE NUMBER OF SECONDS)

	<i>Monthly Average</i>	
	<i>Before</i>	<i>After</i>
Abilene, Texas	0	1005.0
Albuquerque, N. M.	105.0	1560.0
Amarillo, Texas	0	1005.0
Ashville, N. C.	110.0	1552.5
Atlanta, Ga.	783.3	952.5
Austin, Texas	0	1012.5
Baltimore, Md.	1061.6	1150.0
Beaumont, Texas	0	1012.5
Birmingham, Ala.	1200.0	1795.0
Boston, Mass.	1200.0	1647.5
Buffalo, N. Y.	1041.7	1560.0
Charleston, S. C.	81.7	1217.5
Charlotte, N. C.	716.7	1045.0
Chattanooga, Tenn.	0	10.0
Chicago, Ill.	1991.7	2942.5
Cincinnati, Ohio	670.0	907.5
Cleveland, Ohio	1638.3	2820.0
Columbia, S. C.	375.0	1022.5
Columbus, Ohio	718.3	1207.5
Corpus Christi, Texas	0	1012.5
Dallas, Texas	68.3	2212.5
Davenport, Iowa	828.3	1560.0
Denver, Colo.	721.7	992.5
Des Moines, Iowa	785.0	952.5

Findings As to the Facts

TABLE III

(Continued)

(CX-545)

New or Increased TV Markets After the Acquisition

(MONTHLY AVERAGE NUMBER OF SECONDS)

	<i>Monthly Average</i>	
	<i>Before</i>	<i>After</i>
Detroit, Mich.	933.4	1045.0
El Paso, Texas	185.0	2175.0
Erie, Pennsylvania	0	1695.0
Evansville, Ind.	0	1620.0
Fort Worth, Texas	0	435.0
Galveston, Texas	600.0	962.5
Greenville, N. C.	70.0	947.5
Harlingen, Texas	0	345.0
Houston, Texas	868.3	1122.5
Indianapolis, Ind.	978.3	1385.0
Jackson, Miss.	845.0	1297.5
Kansas City, Mo.	1700.0	2112.5
Los Angeles, Calif.	1218.3	2205.0
Louisville, Ky.	876.7	1890.0
Lubbock, Texas	1375.0	2602.5
Memphis, Tenn.	831.7	952.5
Miami, Fla.	506.7	987.5
Midland, Texas	0	577.5
Milwaukee, Wis.	0	977.5
New Orleans, La.	660.0	777.5
New York, N. Y.	1726.7	2105.0
Norfolk, Va.	371.7	432.5
Odessa, Texas	0	435.0
Oklahoma City, Okla.	1353.3	2400.0
Peoria, Ill.	800.0	952.5
Philadelphia, Pa.	1256.7	1382.5
Phoenix, Arizona	73.3	1040.0
Pittsburgh, Pa.	908.3	955.0
Portland, Ore.	1086.7	2282.5

Findings As to the Facts

TABLE III

(Continued)

(CX-545)

New or Increased TV Markets After the Acquisition

(MONTHLY AVERAGE NUMBER OF SECONDS)

	<i>Monthly Average</i>	
	<i>Before</i>	<i>After</i>
Raleigh, N. C.	831.7	1290.0
Roanoke, Va.	71.7	1040.0
Rochester, N. Y.	868.3	2075.0
St. Louis, Mo.	793.3	1042.5
San Angelo, Texas	0	1005.0
San Antonio, Texas	91.7	1825.0
San Francisco, Calif.	1756.6	2027.5
Schenectady, N. Y.	46.7	585.0
Scranton, Pa.	68.3	1040.0
Seattle, Wash.	1191.7	1722.5
Shreveport, La.	68.3	1045.0
Syracuse, N. Y.	1633.3	1897.5
Tampa, Fla.	823.4	865.0
Temple, Texas	0	465.0
Tucson, Arizona	90.0	1297.5
Tulsa, Okla.	76.7	1360.0
Waco, Texas	0	570.0
Washington, D. C.	745.0	857.5
Wheeling, W. Va.	0	1005.0
Wichita, Kans.	799.0	1382.5
Wichita Falls, Texas	0	1005.0
Youngstown, Ohio	0	1005.0
Total.....	43,277.4	96,660.0
Increase		53,382.6
Decrease (See Table IV)		2,359.2
Net Increase		51,023.4

SOURCE: CX545A, B, C, D.

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TABLE IV

(CX-545)

TV Markets Decreased or Dropped After the Acquisition

(MONTHLY AVERAGE NUMBER OF SECONDS)

	<i>Monthly Average</i>	
	<i>Before</i>	<i>After</i>
Bellingham, Wash.	1256.7	457.5
Huntington, W. Va.	150.0	0
Jacksonville, Fla.	1050.0	1040.0
Little Rock, Ark.	305.0	0
Omaha, Nebraska	431.7	320.0
Salt Lake City, Utah	1000.0	827.5
Spokane, Wash.	1288.3	952.5
Tacoma, Wash.	311.7	0
Wilmington, N. C.	163.3	0
Total	5956.7	3597.5
Decrease		2359.2

Monthly average number of seconds of TV spots
in cities used by the Clorox Chemical Com-
pany and not used by the Clorox Company. 930.0

SOURCE: CX545A, B, C, D.

The number of cities used by Clorox Chemical Company for TV spot advertisements before the acquisition was 65, while the number of cities used for such purpose by Clorox after the acquisition was 80, an increase of 15 cities.

The monthly average number of seconds of TV spot advertisements used by Clorox after the acquisition, in cities not used at all by Clorox Chemical Company, was 16,197.5 seconds, while such monthly average of TV spots in cities used by Clorox Chemical Company before the acquisition and not used by Clorox after the acquisition,

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was only 930 seconds. (See Tables III and IV on the preceding pages.)

The number of TV stations used by Clorox for TV spot advertising for the first time after the acquisition was the same as the number of TV stations dropped by Clorox after the acquisition, namely, 28. However, the total number of seconds used by Clorox for such advertising on the 28 new stations for the 8-month period, following the acquisition, August 1, 1957, through March 31, 1958 (157,000), was substantially more than the total number of seconds (104,080) used by Clorox Chemical Company for such advertising during the longer 12-month period, July 22, 1956, through July 31, 1957, on the 28 TV stations dropped by Clorox after the acquisition. (See Tables V(a) and V(b) on the following pages.)

The Clorox Company used 129,580 seconds of TV spot advertising in 19 new cities during the 8-month period following the acquisition, August 1, 1957, through March 31, 1958, whereas Clorox Chemical Company used only 11,160 seconds of TV spot advertising during the 12-month period, July 22, 1956, through July 31, 1957, in 4 cities which were dropped by the Clorox Company after the acquisition. (See Tables VI(a) and VI(b) on the following pages.)

A further indication of a more aggressive sales policy pursued by Clorox after the acquisition of Clorox Chemical Company by P & G is evidenced by the fact that, while Clorox Chemical Company used only 592,020 seconds of TV spot advertising in the 12-month period prior to the acquisition, Clorox purchased a total of 803,060 seconds of TV spot advertising in the shorter 8-month period immediately following the acquisition. (Source CX 545, A, B, C, D.)

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TABLE V(a)

NEW TELEVISION STATIONS USED BY THE CLOROX COMPANY
FOR SPOT ADVERTISING DURING THE PERIOD
AUGUST 1, 1957—MARCH 31, 1958

<i>Location</i>	<i>TV Station used</i>	<i>Total No. of seconds during period</i>
Abilene, Texas	KRBC TV	8,040
Amarillo, Texas	KFDA TV	3,480
Amarillo, Texas	KGNC TV	4,560
Austin, Texas	KTBC TV	8,100
Beaumont, Texas	KFDM TV	8,100
Chattanooga, Tennessee ..	WRGP TV	80
Corpus Christi, Texas	KRIS TV	8,100
El Paso, Texas	KROO TV	3,480
Erie, Pennsylvania	WICU TV	13,560
Evansville, Indiana	WFEI TV	12,960
Fort Worth, Texas	WBAP TV	3,480
Harlingen, Texas	KRGV TV	2,760
Los Angeles, California ..	KRCA TV	10,860
Los Angeles, California ..	KTTV TV	480
Miami, Florida	WCKT TV	2,640
Midland, Texas	KMID TV	4,620
Milwaukee, Wisconsin	WTMJ TV	7,820
Odessa, Texas	KOSA TV	3,480
Salt Lake City, Utah	KTVT TV	2,420
San Angelo, Texas	KCTV TV	8,040
Spokane, Washington	KHQ TV	4,200
Temple, Texas	KCEN TV	3,720
Waco, Texas	KWTX TV	4,560
Wheeling, West Virginia ..	KTRF TV	8,040
Wichita, Kansas	KAKE TV	3,840
Wichita Falls, Texas	KFDX TV	4,560
Wichita Falls, Texas	KSYD TV	3,480
Youngstown, Ohio	WFMJ TV	8,040

Findings As to the Facts

Total TV Spot Advertising on New Stations	157,500
Grand Total of Clorox Spot TV Advertising	803,060
Percent Accounted for by New Stations	19.6

SOURCE: CX545A, B, C, D.

TABLE V(b)

TV STATIONS USED BY THE CLOROX CHEMICAL CO. FOR
SPOT ADVERTISING DURING THE PERIOD JULY 22, 1956—
JULY 31, 1957, DROPPED BY THE CLOROX CO.
AUGUST 1, 1957—MARCH 31, 1958

<i>Location</i>	<i>TV Station Used</i>	<i>Total No. of Seconds During Period</i>
Atlanta, Ga.	WSB-TV	3060
Birmingham, Ala.	WBRC-TV	13400
Chicago, Ill.	WBBM-TV	5820
Cleveland, Ohio	WEWS-TV	1200
" "	WJW-TV	5740
Columbus, Ohio	WBNS-TV	1780
Denver, Colo.	KLZ-TV	3140
Huntington, W. Va.	WSAZ-TV	1800
Jackson, Miss.	WJTV-TV	1200
Little Rock, Ark.	KARK-TV	3660
Louisville, Ky.	WHAS-TV	300
New York, N. Y.	WCBS-TV	1080
Oklahoma City, Okla.	KWTV-TV	1440
Peoria, Ill.	WTVH-TV	260
Philadelphia, Pa.	WRCV-TV	6260
Portland, Ore.	KOIN-TV	9960
Raleigh, N. C.	WTVD-TV	1700
St. Louis, Mo.	KWK-TV	2020
San Francisco, Calif.	KGO-TV	40
" " "	KRON-TV	8880

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<i>Location</i>	<i>TV Station used</i>	<i>Total No. of seconds during period</i>
Seattle, Wash.	KING-TV	1560
Spokane, Wash.	KXLY-TV	4300
Syracuse, N. Y.	WSRY-TV	7480
Tacoma, Wash.	KTNT-TV	3740
Tampa, Florida	WTVT-TV	4340
Washington, D. C.	WTOP-TV	4980
Wichita, Kans.	KTVH-TV	2980
Wilmington, N. C.	WMFD-TV	1960
(28 stations dropped)		

Total TV Spot Advertising
on Stations Dropped 104,080

Grand Total of Clorox Chemical Co.

Spot TV Advertising 592,020

Percent accounted for by stations dropped 17.6

SOURCE: CX545A, B, C, D.

TABLE VI(a)

*New Cities in which The Clorox Company Used Spot
Television Advertising During the Period
August 1, 1957—March 31, 1958*

<i>Location</i>	<i>TV Station used</i>	<i>Total No. of seconds during period</i>
Amarillo, Texas	KGNC	4,560
Amarillo, Texas	KFDA TV	3,480
Abilene, Texas	KRBC TV	8,040
Austin, Texas	KTBC TV	8,100
Beaumont, Texas	KFDM T V	8,100
Chattanooga, Tennessee ..	WRGP TV	80
Corpus Christi, Texas ...	KRIS TV	8,100
Erie, Pennsylvania	WICU TV	13,560

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<i>Location</i>	<i>TV Station used</i>	<i>Total No. of seconds during period</i>
Evansville, Indiana	WFEI TV	12,960
Fort Worth, Texas	WBAP TV	3,480
Harlingen, Texas	KRGV TV	2,760
Midland, Texas	KMID TV	4,620
Milwaukee, Wisconsin ...	WTMJ TV	7,820
Odessa, Texas	KOSA TV	3,480
San Angelo, Texas	KCTV TV	8,040
Temple, Texas	KCEN TV	3,720
Waco, Texas	KWTX TV	4,560
Wheeling, West Virginia ..	WTRF TV	8,040
Wichita Falls, Texas	KFDX TV	4,560
Wichita Falls, Texas	KSVD TV	3,480
Youngstown, Ohio	WFMJ TV	8,040
Total TV Spot Advertising in New Cities		129,580
Grand Total of Clorox Spot TV Advertising		803,060
Percent Accounted for by New Cities		16.1

SOURCE: CX545A, B, C, D.

TABLE VI(b)

Cities in which the Clorox Chemical Company used spot television advertising during July 20, 1956—July 31, 1957, and were dropped by The Clorox Co., August 1, 1957— March 31, 1958

<i>Location</i>	<i>TV Station used</i>	<i>Total No. of seconds during period</i>
Huntington, W. Va.	WSAZ-TV	1800
Little Rock, Ark.	KARK-TV	3660
Tacoma, Wash.	KTNT-TV	3740
Wilmington, N. C.	WMFD-TV	1960

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Total TV spot advertising in cities dropped	11,160
Grand total of Clorox Chemical Co. spot TV advertising	592,020
Percent accounted for by cities dropped	1.9

SOURCE: CX545A, B, C, D.

4. *Savings in Advertising Expenditures.*

Although the record indicates, as contended by respondent, that the per case rate expenditure for advertising and promotion budgeted by Clorox Chemical in the fiscal year ended June 30, 1957, and by the Clorox Company in the 12-month period ended June 30, 1958, were approximately the same, namely 16.4 cents per case, it appears that under P & G control an estimated savings accrued to Clorox in only a part of the latter period in its advertising expenditure as a result of the joint purchase by P & G and Clorox of advertising in the following media, and in at least the following amounts:

Television	\$86,000.00
Radio	500.00
Magazines	50,000.00
Newspapers	2,000.00
Total Savings	<u>\$138,500.00</u>

In addition, there is evidence which indicates that, if Clorox's advertising was fully coordinated with the advertising of P & G, even more substantial discount savings could be effected, which would enable Clorox to purchase considerably more advertising without increasing its per case rate budget for such purpose.

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In an industry where all but a few of Clorox's competitors are small firms with limited financial resources, any such an amount of potential additional advertising cannot be considered insignificant.

That respondent P & G expected to accomplish such savings is indicated in a P & G confidential inter-office memorandum, dated February 28, 1957, recommending the purchase of Clorox Chemical by P & G, where the following statement is made:

"We are advised that Clorox spent \$2,660,000 in the last half of 1956 for advertising, or at the rate of \$5,320,000 a year. We believe that *P & G advertising philosophies and economies* applied to an advertising expenditure of this size can be expected to further advance the Clorox business."

* Underscoring supplied.

XI. Efforts of Clorox Under P & G Ownership and Control To Prevent A Competitor From Entering Or Expanding in the Liquid Bleach Market.

1. In Erie County, Pennsylvania.

Prior to October 1957, as hereinbefore indicated, Clorox's market share of the household liquid bleach market in Erie, Pennsylvania was more than 50% of the total sales in that area, and the other principal brand of household liquid bleach sold in that market was the 101 Brand, manufactured by the Gardiner Manufacturing Company, which brand enjoyed approximately 30% of the market at that time. On or about October 14, 1957, the Purex Company began a market test in that area by offering a new energized household liquid bleach in a new improved type of container and handle, with a new label attached. A special

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advertising campaign was put on, and promotional allowances were made to the dealer to enable him to sell the product at a lower price to the public. Coupons were widely distributed in the Erie area, entitling the housewives to a reduction of from 10 cents to 25 cents on the purchase of new Purex depending upon the size of the container.

Clorox, under the control of respondent P & G, combined an advertising and promotion campaign to prevent the Purex entry into the Erie, Pennsylvania, market. The first step was an advertisement placed in an Erie, Pennsylvania, newspaper on November 25, 1957, described as "Money Saving Clorox Special," and showing Clorox cents-off labels of 7 cents off on gallons, 5 cents off on half-gallons, and 3 cents off on quarts, and emphasizing the fact that the offer was available only in Erie County. Another premium offer was made in January 1958. This was followed, in February 1958, with a "Big Bargain Offer in Erie County" of a regular \$1 ironing board cover for 50 cents with each purchase of Clorox. A special newspaper advertisement, featuring the ironing board cover offer, was scheduled to run in the Erie Times-News on February 20 and 21, 1958, and distributors in Cleveland were furnished quantities of display material to be sent to and used by the dealers in the Erie County area. In addition to the ironing board cover promotion advertisement, to be run on February 20 and 21, a second advertisement appeared in the Erie Times-News on February 27 and 28, 1958, and the dealers were furnished copies of a full-page Clorox advertisement carrying its selling message in the February issues of Good Housekeeping, Better Homes and Gardens, Ladies' Home Journal, and Parent's magazines; also a stepped-up schedule of Clorox television advertising in Erie County supplied additional selling support during the

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month of February. In addition, reprints of the two Clorox newspaper ads and the magazine ads were sent in quantities to the distributors for mailing to the dealers, along with the bulletins in use at that time by the distributors.

Clorox continued to run these promotions in the Erie market until the end of March 1958. From October 1957, to March 31, 1958, Clorox spent more than \$4,000 for TV spots, and \$2,400 for newspaper advertisements in the Erie County promotion campaign, although TV spot had never before been used by the Clorox Company to advertise in that area.

As a result of this campaign conducted by Clorox under P & G control, Clorox was successful in nullifying Purex's test market attempt and in preventing Purex from becoming a substantial factor in the Erie County market. Although Purex was able to nearly equal Clorox in its share of the market of household liquid bleach in the Erie area in the period November 11 to December 9, 1957, Clorox was able to regain and even increase its market position in that area by the first of March 1958, at which time the Purex share had been reduced to approximately 7%.

As a final result, according to an official of the Purex Company, the market test that was run in Erie, Pennsylvania, was cancelled out because the Purex market share did not remain at a reasonably good level. He stated: "It is not possible to do the piece of research that we anticipated, and get meaningful results."

An indirect result of the failure to successfully test the market in Erie, Pennsylvania, according to this official of the Purex Company, was the purchase by Purex of the John Buhl Products Company brand of household liquid bleach, "Fleecy-White." When asked for the reasons for

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the purchase of the John Buhl Products Company, this Purex official stated:

"One was that Purex had been unsuccessful in expanding its market position geographically on Purex liquid bleach. The economics of the bleach business, and the strong competitive factors, as illustrated by our experience in Erie, Pennsylvania, made it impossible, in our judgment, for us to expand our market on liquid bleach. Fleecy-White represented a brand that sold in fair volume in a limited geographical area, and this area represented an expansion of our geographical area."

2. In Evansville, Indiana.

The Purex Company also attempted a market test in Evansville, Indiana, at about the same time that it conducted the test in Erie, Pennsylvania. There was the difference that Purex had been selling its product in the Evansville market prior to October 1957, and no price-off coupons were used by it in the test. All that Purex did in the Evansville market, apparently, was to step up their advertising, featuring the newly designed bottle and label. However, Clorox countered by using price-off labels of 2 cents, 4 cents and 6 cents in the Evansville market during the time Purex was attempting to test the market in that area.

3. In Other Markets.

At the times the Purex Company introduced its newly designed bottle and handle in other trade areas throughout the country, Clorox systematically countered with such "promotional devices" as price-off labels, coupons on the bottle, newspaper coupons, merchandising packs, and self-

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liquidating premiums, which were generally offered for periods of four or five weeks at a time. These promotions were put on in different local and regional areas throughout the country, the majority of which were utilized from May through August 1958, in the following recorded market areas: Atlanta, Georgia; Los Angeles and San Francisco, California; Chattanooga and Nashville, Tennessee; and the Pacific Northwest. In fact, Mr. Eric Bellingall, Vice President of the Advertising Agency handling the Clorox account testified that: "We drew up a list and had ready a group of these promotions and we got a list of dates when Purex was moving across with its (new) bottle."

When questioned about such promotions, Mr. Bellingall further testified as follows:

"Your Honor, you generally don't wait in most instances to let him get too much of an inroad. Now, we had this research of promotions that I had discussed and as Trimpe reported that the new bottle had shown up in this territory, and so forth, we would then move to counter with one of this pool of things.

"We have used as different devices, price off labels, the coupon on the bottle, the newspaper coupon, and so on, and in some territories, we did not meet it with a promotion, but tried to meet it with whatever increase there was in an advertising schedule.

... "Sometimes we won't wait for the full effect of the competitor's promotion to take place with the consumer, that is, if he moves with a promotion, we may elect to move simultaneously or as close to simultaneously as we can. In other instances, and this can depend on holidays and so forth, we wait until we get a better reaction from our distributors in the area, and then try to go in to prevent the second pur-

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chase. Am I clear there, where a promotion might do a sampling job for the competitor and we would move against the time that we would judge that the woman would be going back for a second bottle. We don't want her to be setting up a habit of purchasing the thing that she has been temporarily attracted to by a promotion, so there is a variety of timings in this activity."

XII. Subsequent to the Acquisition By P & G On August 1, 1957, Clorox's Market Share of the Total Household Liquid Bleach Sales (On Both a Quart Equivalent Basis and a Consumer Dollar Basis) Has Increased Substantially.

The following table of comparable bi-monthly periods, before and after P & G acquired Clorox, prepared from the Nielsen reports, shows that for the months of August-September 1956, Clorox's market share, on a 32 oz. equivalent basis, was 44.9% and that in August-September 1957 and in each similar bi-monthly period thereafter Clorox's market share increased, until in August-September 1960 it enjoyed a market share of 49.2%, an increase of 4.3 percentage points in the four years subsequent to the acquisition. Similarly, the table shows that from the October-November 1956 period Clorox's market share increased from 45.3% to 48.9% in the same months of 1960, an increase of 3.6 percentage points, and that from the December-January pre-acquisition period to the comparable 1960-1961 period, its market share increased by 3.7 percentage points, or from 45.4% to 49.1%. The table also shows that Clorox's market share reflects a similar increase from the amount shown in each of the other three bi-monthly periods prior to the acquisition to the amounts shown in

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each of the comparable bi-monthly periods in 1960-1961, for increases of 2.7, 3.1, and 2.3 percentage points respectively. Also reflected in the table is an average annual increase from 45.3% in the 1956-57 pre-acquisition period to 48.6% in the 1960-61 period, or an average annual increase of 3.3 percentage points.

TABLE VII

*Comparable Bi-Monthly Periods Before
and After P & G Acquired Clorox
(on a 32 oz. Equivalent Basis)*

	<i>Clorox Market Share</i>				
	1956-57	1957-58	1958-59	1959-60	1960-61
Aug.-Sept.	44.9	45.5	46.5	47.9	49.2
Oct.-Nov.	45.3	45.2	45.8	48.9	48.9
Dec.-Jan.	45.4	45.5	47.0	48.6	49.1
Feb.-Mar.	45.7	45.7	47.0	48.6	48.4
Apr.-May	44.9	45.7	47.1	48.8	48.0
June-July	45.7	46.9	47.2	49.7	48.0
Average	45.3	45.8	46.8	48.8	48.6

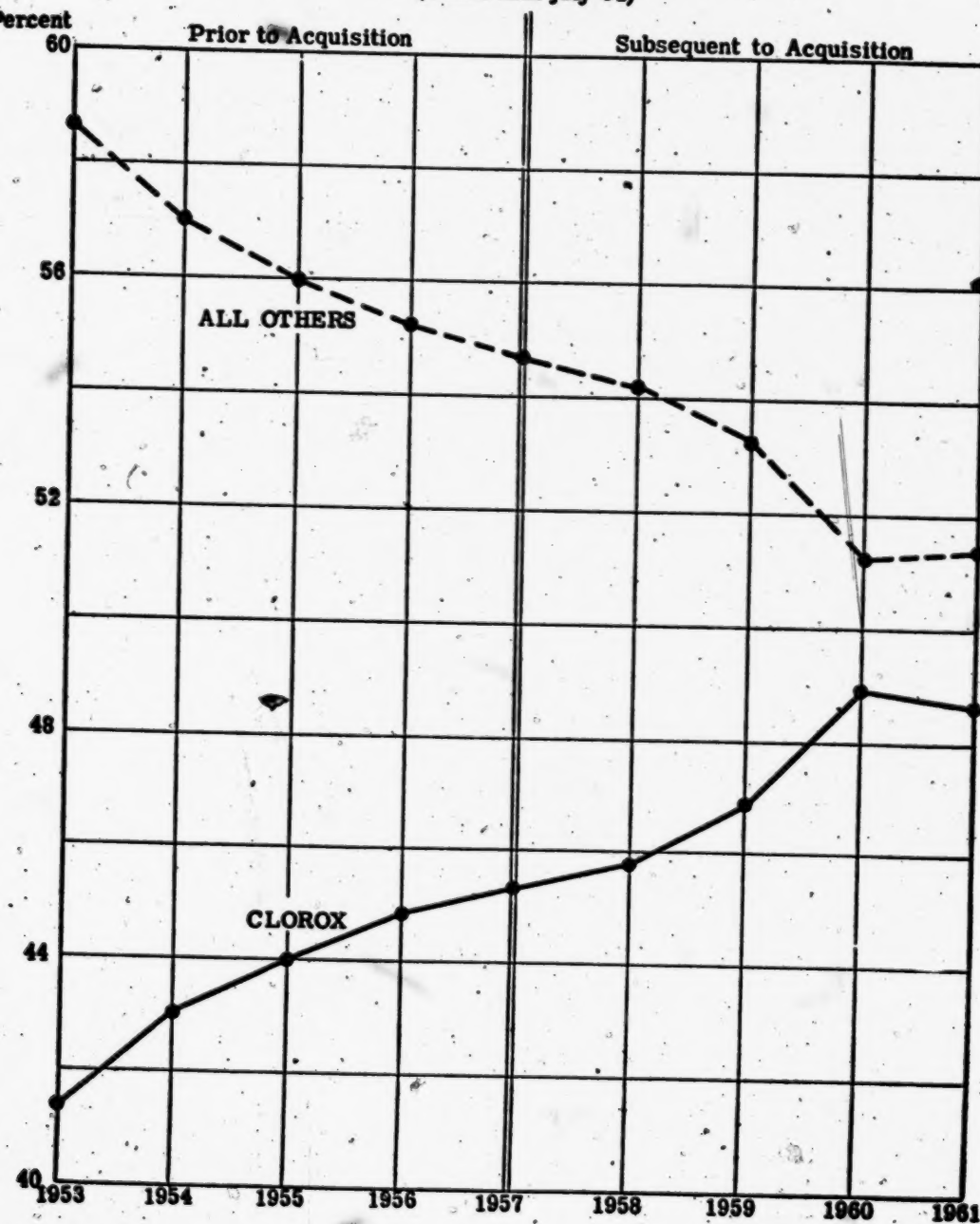
SOURCE: RX 134-B.

The following graph clearly reflects the increase in Clorox's market share and the decrease in the market share of "All Others," before and after the acquisition, on a 32 oz. Equivalent Unit Basis. It will be noted that the *trend* of increase in Clorox's market share and the *trend* of decrease in the market share of "All Others" accelerates significantly subsequent to August 1, 1957, the date of acquisition.

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MARKET SHARE - CLOROX AND ALL OTHERS
32 OZ. EQUIVALENT UNIT BASE
(Years End July 31)



SOURCE: RX 134A.

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The following table, also prepared from the Neilsen reports, makes the same comparisons on a consumer dollar basis and shows an even greater increase in Clorox's market share from the periods immediately preceding the acquisition to the comparable 1960-61 periods than is reflected in table VII prepared on a 32 oz. equivalent basis. For example, this table shows an increase from August-September 1956 to August-September 1960 in Clorox's market share from 48.0% to 52.4%, or an increase of 4.4 percentage points; from October-November 1956 to October-November 1960, an increase of 3.4 percentage points, and similar increases in each of the other comparable periods shown in the table down to and including the June-July 1961 period, which shows an increase of 2.7 percentage points over the June-July 1957 period. The table also shows an average annual increase from the 48.4% in the 1956-57 pre-acquisition period to 51.9% in the 1960-61 period, or an average annual increase of 3.5 percentage points.

TABLE VIII

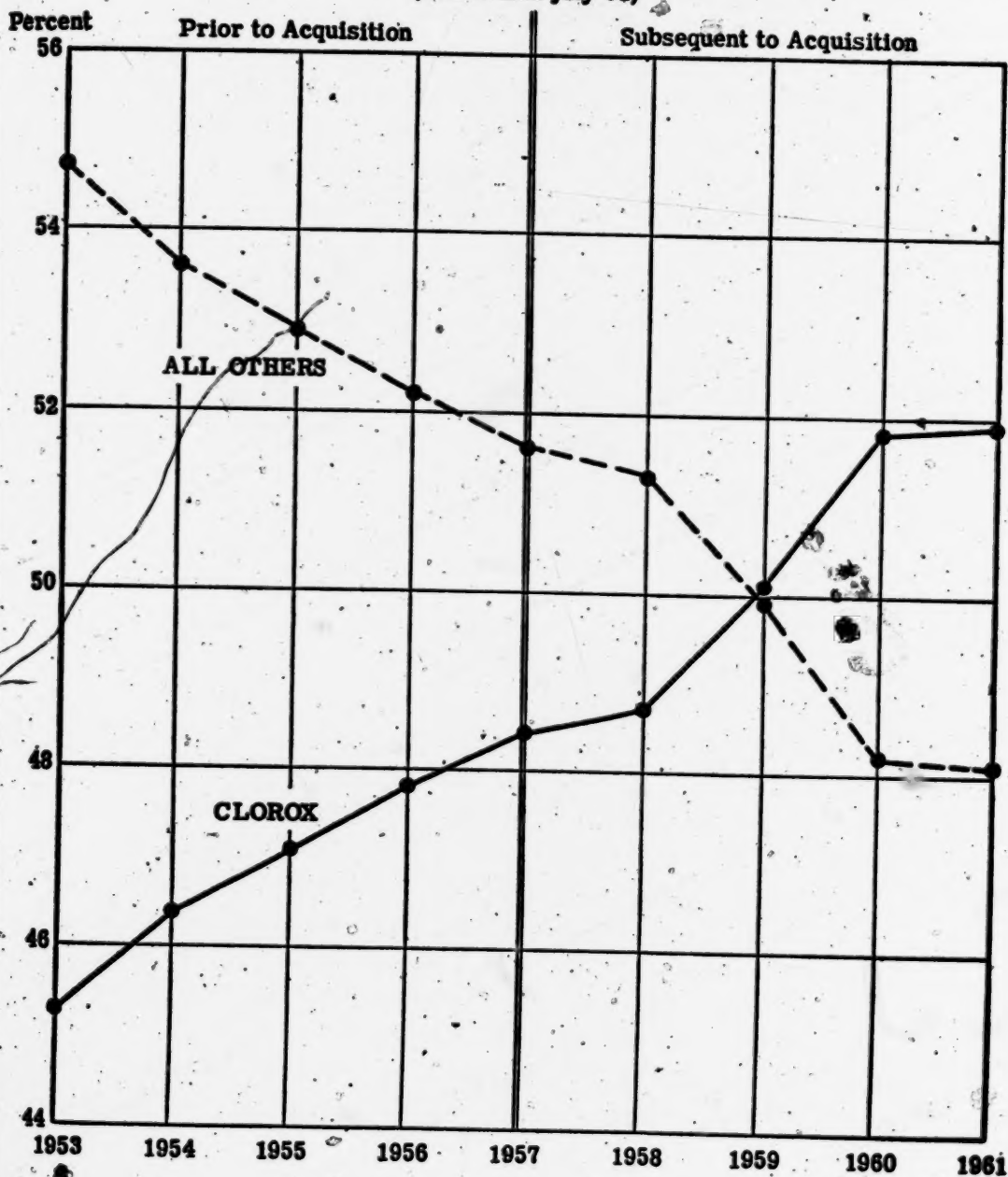
*Comparable Bi-Monthly Periods Before
and After P & G Acquired Clorox
(on a Consumer Dollar Basis)*

<i>Clorox Market Share</i>					
	1956-57	1957-58	1958-59	1959-60	1960-61
Aug.-Sept.	48.0	48.4	49.6	50.9	52.4
Oct.-Nov.	48.6	48.2	49.3	51.9	52.0
Dec.-Jan.	48.4	48.6	50.3	51.7	52.3
Feb.-Mar.	48.8	48.6	50.3	51.7	51.7
Apr.-May	48.0	48.8	50.5	52.0	51.6
June-July	48.8	49.6	50.4	52.5	51.5
Average	48.4	48.7	50.1	51.8	51.9

SOURCE: RX 135-B.

*Findings As to the Facts***MARKET SHARE - CLOROX AND ALL OTHERS
DOLLAR BASE AT COST PRICE TO CONSUMERS**

(Years End July 31)



SOURCE: RX 135A.

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The preceding graph also clearly shows the increase in Clorox's market share and the decrease in the market share of "All Others," before and after the acquisition on a Consumer Dollar Basis. It will be noted that the *trend* of increase in Clorox's market share and the *trend* of decrease in the market share of "All Others," subsequent to the acquisition, accelerates at an even greater rate on the Consumer Dollar Basis than is reflected in the graph prepared on a 32 oz. Equivalent Basis.

XIII. Clorox and Purex Market Shares In Pacific, Southwest and West Central Regions Combined.

At the original hearings, the respondent submitted a tabulation of household liquid bleach bi-monthly sales in the Nielsen Pacific, Southwest, and West Central Territories combined, for the period June-July 1957, through October-November 1957, on a unit basis. (RX 91) This tabulation shows that during this period Clorox's share of the market in those areas declined until Purex and Fleecy-White's combined share was larger than that of Clorox. However, the abnormality of that selected period is evident from the following chart, showing for the same territories the percent of market shares of Clorox, Purex and Fleecy-White on a bi-monthly basis, from February-March 1957, through October-November 1958, the latest available data then of record. The dotted line portion of this graph shows the period included in respondent's exhibit (RX 91) referred to above. It is evident from this graph that not only did Clorox catch up and pass Purex and Fleecy-White combined by April 1958, but that the Purex share of the market declined below what it was prior to P & G's acquisition of Clorox in August 1957. (RX 91 and CX 668)

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There were submitted by respondent at the remand hearing, tabulations showing the market share of Clorox on a 32 ounce equivalent unit basis in those same areas for the years 1953 to 1961 (RX 136). There was also submitted at this hearing by Commission's counsel an exhibit taken from Nielsen Food Index showing the shares of Clorox, Purex and others on a consumer dollar basis for this area. From an examination of these figures, it is apparent that the relative position of Clorox and Purex, as indicated in the following graph, has been substantially maintained during the subsequent period 1958 to 1961. The only change indicated is an increase of about one percentage point in the market share of Clorox. For that reason, no attempt is made to extend the graph to reflect the latter period.

XIV. The Effect of the Acquisition of Clorox Chemical By The Respondent P & G May Be To Suppress The Competition Of Not Only Purex But Other Small Competitors.

A. AS TO THE PUREX COMPANY.

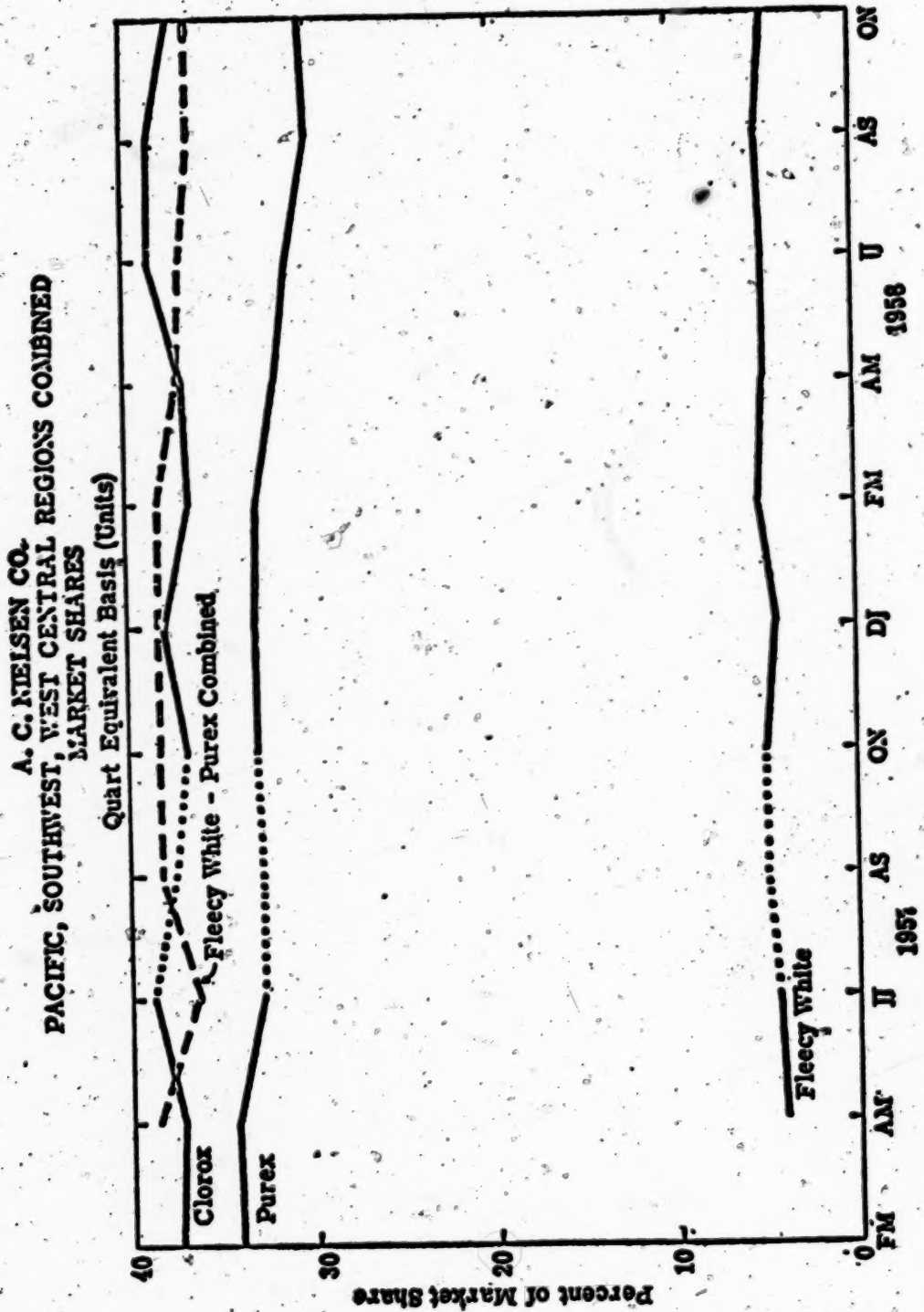
According to the testimony of the President of the Purex Company:

"The acquisition of Clorox by Procter & Gamble, in our opinion, will have a serious effect upon Purex's business and Purex's ability to compete in the liquid bleach business, particularly if the same promotion devices which are normally used by Procter & Gamble are applied to the liquid bleach business."

B. AS TO THE LINCO PRODUCTS CORPORATION.

As hereinbefore indicated, this Company is respondent's principal local competitor in the Chicago, Illinois, terri-

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Note: Dotted Lines refer to data from RX 91.

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tory. The President of that company testified with respect to the effect upon his business of the acquisition of Clorox Chemical by respondent P & G:

"Well, I would say that this acquisition would create a situation where Linco Company will have a hard time to compete. When you stop to look at the resources that they have and the type of promotion that they put up when they buy or put out a new item, you can see that things are very serious. When they start a saturating campaign—that means radio, newspaper, TV, plus sampling, coupons, all that put together, including floor displays in the stores, which they would be able to get following all its advertising; and not only that, but they would be able to get probably more shelf space than competition, and all that together would eliminate the small manufacturer like us."

C. AS TO THE ROSE-LUX CHEMICAL COMPANY.

An official of the Rose-Lux Chemical Company, manufacturer of "Rose-X Bleach" brand of household liquid bleach, when asked what effect the acquisition by P & G of Clorox Chemical will have upon his company, testified:

"Well, it's bound to hurt our business and it's bound to decrease our sales."

D. AS TO THE J. L. PRESCOTT COMPANY.

An official of the J. L. Prescott Company, manufacturer of the "Dazzle" brand of household liquid bleach, hereinbefore mentioned, when asked what effect, in his opinion, the acquisition of Clorox Chemical by P & G would have upon his business, testified:

"Well, it is our feeling that if approximately the same promotions are continued that the Clorox Chemical Company used, and in addition to that, things

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such as coupons, so much off on the label, that type of promotion added to it would definitely be harmful to our business."

E. AS TO THE SUNLIGHT CHEMICAL CORPORATION.

The President of the Sunlight Chemical Corporation of Rumford, Rhode Island, when asked what some of the competitive factors are which determine whether or not his company sells household liquid bleach, testified:

"I think our main competitor selling liquid bleach is the amount of money that our competitors have to spend for advertising. I do not think it is the product itself of our competitors that we fear as competition because all good brands of bleach are, chemically speaking, identical. They bear a different trade name. It is the ability of the larger companies to spend tremendous amounts of money in advertising that gets them the business instead of the smaller company like ourselves."

When asked specifically what effect the acquisition of Clorox Chemical by P & G would have on his business, he testified:

"—I still think it would be more difficult for us to sell with a stronger competitor. It seems to me that is only logical. The stronger your competitor, the more resourceful, the more experienced, the more money he has, the more business he should get, and less we should get.

"So I say almost unqualifiedly that we will suffer by this taking over of Clorox by Procter & Gamble."

F. AS TO THE SAVOL COMPANY.

A partner of the Savol Chemical Company of Hartford, Connecticut, hereinbefore mentioned, when asked what effect the acquisition of Clorox Chemical by respondent P & G would have on his business, testified:

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"Frankly, we have learned to live with Clorox. As an individual I am a little bit apprehensive if Procter & Gamble goes on with the method of advertising, method of sampling, method of coupons, and the method of sales that they have used with Procter & Gamble products, both to the wholesaler and to the individual stores, of what they may do to the bleach business.

"Again, I am speaking as an individual. We have a little business. We are trying to get along. We are not trying to coop in or take in the entire world. We are making a living. If and when the advertising, if Procter & Gamble would go out with advertising such as they have with other of their products, it would take very little to put us out of business because there isn't enough of a spread or a profit that we are making.

"And that is the thing that troubles me a little bit, and I can't help but be a bit apprehensive of it."

G. AS TO THE GARDINER MANUFACTURING COMPANY.

The President of the Gardiner Manufacturing Company of Buffalo, New York, hereinbefore mentioned, testified that he generally followed the Clorox price structure in selling to the trade, and when asked what effect the acquisition of Clorox Chemical by P & G would have upon his business, testified as follows:

"Well, I am scared of it, definitely, because of their larger capacity, purchase, advertising matter—makes it that they can cover the trade at a much lower cost than I can. They have a much larger sales force, which is selling their other products, which can also promote Clorox. The entire business really scares us because of the possibilities of what could happen."

H. AS TO JONES CHEMICALS, INC.

The President of Jones Chemicals, Inc., of Caledonia, N. Y., hereinbefore mentioned, when asked what effect, if

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any, the acquisition of Clorox Chemical by P & G would have upon his business, testified:

"If Clorox—runs along the way they have been running, in the experience that I have had with them for 27 years, then I feel that my company or any of our associates could meet them in the market place and operate satisfactory as we have in the past. If they become a more aggressive merchandiser, getting away from the newspaper technique of influencing sales through newspaper advertising and go to the more, you might say, dynamic form of merchandising such as only soap people know how to employ, then people like myself would be in trouble."

I. AS TO B. T. BABBITT COMPANY.

The B. T. Babbitt Company had long been a competitor of P & G in the detergent and cleanser field. As hereinbefore indicated, it acquired Chemicals, Inc., in August 1956, which manufactured a household liquid bleach which sold under the brand name "Vano" in and around San Francisco, California. The Babbitt Company continued to manufacture and sell this product until about April 1958, when it decided to discontinue manufacturing its household liquid bleach.

The Chairman of the Board and Treasurer of this company testified that his firm had a policy since approximately 1953 not to compete unnecessarily with the "soapers," referring to soap manufacturers. When asked what effect, if any, the acquisition of Clorox Chemical by P & G would have on the Vano liquid bleach business, he testified:

"From this point on, it isn't going to have any effect, because several months ago we decided to discontinue manufacturing the product."

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Since the witness was testifying in June 1958, it is apparent that the decision to discontinue the manufacture was shortly prior to that date, or about April 1958. He further testified that:

"We acquired the Vano Liquid Bleach in August of 1956 and have not promoted the product or advertised the product since the franchise of Clorox was so strong, so I feel that one of the contributing factors to our decision to discontinue the product was the acquisition of Clorox by Procter & Gamble, since it was obvious that we would not, under these conditions, entertain any thought of establishing a satisfactory franchise on Vano Liquid Bleach."

XV. The Addition of Clorox to the P & G Line of Soaps, Detergents, and Cleansers Will Add Merchandising Strength and Support to Clorox Which Was Not Available to the Clorox Chemical Company.

There is an abundance of evidence in this case that there is a definite relationship between soap products, detergents, household cleansers and household liquid bleach, such as Clorox. This is apparent from their very nature, the uses to which they are placed by the housewife, and the way in which they are placed, grouped and displayed on the shelves of the grocery stores, and the promotional effort that is put behind those items. As pointed out by an official of one of the Clorox competitors:

"The multi-product manufacturer can maintain stronger sales reports at the retail level. This is an aid in getting shelf space. The multi-product manufacturer normally has lower sales cost, so he has more promotion power; this is an aid in getting shelf space. The more products a manufacturer in our general commodity class sells to the grocery store at a profitable volume, of course, the more power he has to pro-

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mote, and all these things are aids in getting shelf space."

Another competitor testified that household liquid bleach is very definitely adaptable to the promotional techniques used by soap companies. He pointed out that household liquid bleach is used by 95% of the housewives in the United States, and that when such an item is so universally used, it is very adaptable to merchandising techniques.

XVI. The Industry-wide Concentration of the Production and Sale of Household Liquid Bleach May Be Increased.

While the acquisition of Clorox Chemical by P & G in and of itself did not immediately result in increased industry-wide concentration in the production and sale of household liquid bleach, the record indicates that the results flowing from the acquisition already have resulted in some increased concentration and may well, in time, result in even more increased concentration in the production and sale of household liquid bleach.

For example, as a result of Purex's unfortunate experience at the hands of Clorox, when it attempted to test market its improved bleach and container in Erie, Pennsylvania, and Evansville, Indiana, Purex decided that its only opportunity to increase its sales and expand its territory was through acquisition, and it therefore acquired the Fleecy-White brand of household liquid bleach, thus increasing the concentration in that industry.

Another example is the decision of the B. T. Babbitt Company to discontinue the sale of its Vano brand of household liquid bleach, as a result of the acquisition of Clorox Chemical by P & G.

In addition, it would appear reasonable to expect P & G, with its financial resources available for the advertising

Findings as to the Facts

and promotion of Clorox at any time and any place, and to the extent it may deem desirable, together with its admitted managerial, advertising and promotional expertise, to continue to increase the Clorox share of the market at the expense of its smaller and less resourceful competitors.

XVII. The Market Share Position of Clorox Liquid Bleach Before and After Acquisition.

On page 12 of the respondent's "Proposed Findings of Fact and Conclusions, after Remand" the respondent states:

"The Commission's Opinion plainly indicates the significance which it attaches to evidence respecting the *trend** of market shares. At page 4 of its Opinion it properly notes that no conclusion can be reached with respect to the substantiality or materiality of any post-acquisition Clorox market share increase, which is claimed to be a result of the acquisition, without consideration of and comparison with the *'pre-acquisition growth trend of Clorox.'*"

The respondent also states on pages 12 and 13 of its "Proposed Findings":

"Nielsen data respecting market shares in the household liquid bleach industry are compiled and reported on both a 32-ounce equivalent unit basis and on a consumer dollar basis. The 32-ounce equivalent unit basis is preferable to the consumer dollar basis as a reflection of market conditions or market share data because it measures the actual volume of merchandise moving through grocery stores, and is not influenced by retail price changes, temporary or otherwise."

* Emphasis supplied.

Findings as to the Facts

"[*Comment:* Statistical data used throughout these findings with respect to household liquid bleach moving through grocery stores in the United States are based upon the Nielsen Food Index Reports and exhibits prepared therefrom which were offered in evidence. The accuracy of Nielsen figures was stipulated by both parties at the instance of complainant in the initial hearings (Tr. 2066A-2066B) and reaffirmed by counsel for both parties during the hearings on remand (Tr. 6275).]"

The hearing examiner accepts the above statements.

The respondent then includes tables on pages 14 and 15 of its "Proposed Findings" showing the annual changes in Clorox's market share of the total sales of household liquid bleach in the United States, moving through grocery stores, for each of the four years preceding and for each of the four years subsequent to the acquisition, on (1) a 32 oz. Equivalent Unit Basis and (2) a Consumer Dollar Basis, indicating the percentage point change in each year, before and after acquisition, in both tables.

The hearing examiner accepts the presentation in both tables to this extent.

The respondent then proceeds to show the "Total Change" and the "Average Annual Change" in the percentage point change, of Clorox's market share before and after the acquisition in both tables and contends (on page 16) that since there is only a small difference in the "Average Annual Change" in the four years subsequent to the acquisition, "there is no significant difference between the post and pre-acquisition growth trend of Clorox."

This contention the hearing examiner rejects for the reason that the use of the "Average Annual Change" rather than the *annual trend* in the change in Clorox market share conceals the actual pre-acquisition and post-

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acquisition *growth trend* of Clorox, the importance of which the Commission stressed in its Opinion of June 15, 1961.

It is believed that the *annual trend* in the change in the market share of Clorox before and after the acquisition is much more significant and a more reliable index than the *average annual change* in such market share, as used by the respondent in its "Proposed Findings of Fact." This is particularly true in the instant case since the record reveals that although Clorox's market share increased consistently both before and after the acquisition, it also clearly shows that the *rate of increase*, on both a consumer dollar basis and a 32 oz. equivalent basis, slowed perceptibly and constantly from August 1, 1953 to August 1, 1957, the date of acquisition, and that immediately following the acquisition the rate of increase reversed its downward trend and increased at an accelerated rate from August 1, 1957 to August 1, 1960. Also, as hereinbefore indicated, the annual trend in the change of Clorox's market share can be correlated with Clorox's expenditure for promotional activities during the four years subsequent to the acquisition. Also, as previously indicated, the decline in the trend in Clorox's market share from August 1, 1960 to August 1, 1961 is definitely traceable to the substantial decrease in Clorox's promotional expenditures during this same period of time.

CONCLUSIONS

The acquisition in this proceeding presents a novel question, one that has never been adjudicated by either the Federal Trade Commission or the courts in a formal proceeding. It is what might be called a conglomerate type of acquisition, or merger, in that the Clorox Chemical Company, the acquired corporation, was engaged in the

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sale and distribution of household liquid bleach, a product which respondent Procter & Gamble, the acquiring corporation, had never manufactured or sold. This product, however, is distributed to the public mainly through grocery stores and is used principally in the home as an adjunct to laundry soaps, detergents, and abrasive cleansers, and thus might be considered complementary to such products, which are the principal products manufactured and sold by respondent.

To determine whether this acquisition is in violation of Section 7 of the Clayton Act, as amended, attention must be given to that industry in which the acquired corporation was engaged, and an attempt made to evaluate the impact on competition in that industry growing out of the acquisition. In order to do that, it is necessary to take into consideration the size and experience of the acquiring corporation in the conduct of its business prior to the acquisition, the manufacture and sale of products sold by it over the past few years, and then to make an evaluation of what the normal result probably will be when a corporation such as Procter & Gamble, the acquiring corporation, enters into the other industry, and utilizes the same methods of operation that it utilized in its prior fields of endeavor.

Following this pattern, or approach to the problem in this case, we find that the respondent herein is, and has been for a number of years, a financially powerful and aggressive commercial organization which depends on advertising and sales promotion practices and methods described in the above findings, through which, and by which, it has succeeded in becoming the largest manufacturer and distributor of soaps and detergents in the United States, and a leading manufacturer of other household products

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such as abrasive cleansers. The respondent is recognized as one of the largest, if not the largest advertiser, in the United States. In addition to its national advertising campaigns, it has effectively engaged in aggressive competitive sales promotion programs, few of which had been used by the acquired corporation, Clorox Chemical, the leader in the household liquid bleach industry, prior to the acquisition, although some competitors of Clorox Chemical had used some of such programs.

From the foregoing Findings as to the Facts, therefore, it is concluded that as hereinbefore indicated, the line of commerce in this case is household liquid bleach; the sections of the country involved are the entire United States and the nine sections, or regions, described above. It is also concluded that one of the results of the acquisition of Clorox Chemical by the respondent, P & G, probably will be the substantial lessening of competition between the respondent-owned Clorox and the smaller manufacturers and distributors of household liquid bleach, in the United States, and the definite tendency to create a monopoly in the respondent P & G in the household bleach industry, based on one or more of the following factors:

A. The dominant market position in the household liquid bleach industry held by Clorox, which it, under control of the respondent, has been able to increase as a result of the acquisition and the various advertising campaigns, sales promotion programs and devices engaged in since the acquisition.

B. Respondent's financial and economic strength and advertising and promotional experience as compared with its competitors in the household liquid bleach industry.

C. Respondent's ability to command consumer acceptance of its products and to acquire and retain valuable

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shelf space in independent and chain grocery stores as a result of its advertising and promotional experience and financial resources.

D. The competitive position or share of market enjoyed by Clorox, under respondent's control, in the production and sale of household liquid bleach has been enhanced to the detriment of actual and potential competition, and as hereinbefore shown, the decline in the pre-acquisition *growth trend* of Clorox has been reversed and its post-acquisition *growth trend* has responded directly to the substantial promotional expenditures, made by Clorox under P & G ownership. It can fairly be anticipated that, if Clorox, a wholly owned subsidiary of respondent P & G, continues its present methods of promotion and advertising, its dominant competitive position will be further enhanced.

E. The increasing tendency of concentration of competitors in the household liquid bleach industry.

F. The ability of Clorox, through its aggressive P & G inspired advertising and sales promotion methods and devices, to prevent the entry of additional competitors into the household liquid bleach industry, and to prevent the competitors it already has from expanding by normal methods of competition.

G. Furthermore, according to the testimony of officials of competing manufacturers and distributors of household liquid bleach, there is an apparently well-founded fear on their part that the aggressive advertising and sales promotion methods of respondent P & G used by Clorox in the household liquid bleach industry will result in serious injury to their business. The evidence introduced at the recent hearings showing a decline in the market share of some of Clorox's smaller competitors, since the acquisition,

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indicates that such fear expressed by at least some of these competitors was, in fact, well-founded. As hereinbefore mentioned, the record indicates that it was not the policy of the Clorox Chemical Company, the acquired corporation, to meet the sales promotions or test marketing of its smaller competitors with aggressive counter-promotions and retaliatory tactics. It had attained its leading position in the household liquid bleach industry mainly by national advertising. However, the evidence indicates that it has been the policy of Clorox, since its acquisition by P & G, to meet, and meet vigorously, the promotions and test marketing of its competitors. As hereinbefore related, these retaliatory tactics have been used especially against Purex and Roman Cleanser, the second and third largest household liquid bleach manufacturers in the industry.

To summarize the basis for the foregoing conclusions, the deciding factor is the ability of Procter & Gamble's conglomerate organization to shift financial resources and competitive strength through a broad front of different products and markets and its ability to strategically alter the selected point of greatest impact as time, place and market conditions require. It is not necessary that the conglomerate enjoy a predominate position in any industry or market, although in this particular case Procter & Gamble does enjoy such a position in the soap and detergent industry. The test of conglomerate power is whether a corporation is able to concentrate its competitive efforts at one point by shifting its financial resources and competitive strength from one industry or market to another. Procter & Gamble possesses this power and ability.

In view of the facts set forth in the aforesaid Findings, and Conclusions, and in the light of the avowed purpose of the amendment to Section 7 to protect small units in an

Conclusions

industry, it is concluded that the effect of the acquisition of the Clorox Chemical Company by respondent the Procter & Gamble Company may be to substantially lessen competition and to tend to create a monopoly in the production and sale of household liquid bleaches in the United States in violation of Section 7 of the Clayton Act, as amended December 29, 1950, and an order of divestiture should be entered to restore, insofar as possible, the competitive situation in the household liquid bleach industry existing prior to the acquisition.

The foregoing legal conclusion is supported by the House Committee Report:¹

"If for example, one or a number of raw material producers purchases firms in a fabricating field (i.e. a 'forward vertical' acquisition), and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated, even though there did not exist any competition between the acquiring (raw material) and the acquired fabricating firms.

"The same principles would, of course, apply to backward vertical and conglomerate acquisitions and mergers.

*"The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy."**

In the House of Representatives, Representative Boggs of Louisiana in discussing the bill to amend Section 7 of the Clayton Act, made the following statement with respect to the purpose and effect of the bill:

¹ H. R. Rep. 1191, 81st Cong., 1st Sess., p. 11 (1949).

* Emphasis supplied.

Conclusions

"A third avenue of expansion—and this is one of the most detrimental movements to a free enterprise economy—is the conglomerate acquisition. This is the type which carries the activities of giant corporations into all sorts of fields, often completely unrelated to their normal operations. In times such as these, when big corporations have such huge quantities of funds, they are constantly looking around for new kinds of businesses to enter. By this process they build up huge business enterprises which enable them to play one type of business against another in order to drive out competition." * 1

The U. S. Supreme Court, in the Dupont case, also supports this legal conclusion in the following language: 2

"The first paragraph of Section 7, written in the disjunctive, plainly is framed to reach not only the corporate acquisition of stock of a competing corporation where the effect may be substantially to lessen competition between them, *but also corporate acquisitions of stock of corporations, competitor or not, where the effect may be either* (1) to restrain commerce in any section or community, or (2) tend to create a monopoly of any line of commerce . . .

"We hold that *any acquisition* by one corporation of all or any part of the stock of another corporation, *competitor or not*, is within the reach of the Section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. . . ." *

In accordance with the foregoing Findings and Conclusions, the following order is entered.

¹ 95 Cong. Rec. 11496 (1949).

² 353 U. S. 586, pages 590-91-92.

* Emphasis supplied.

*Order of Divestiture***ORDER OF DIVESTITURE**

IT IS ORDERED that respondent The Procter & Gamble Company, a corporation, and its subsidiaries, officers, directors, agents, representatives and employees, shall cease and desist from violating Section 7 of the Clayton Act, as hereinbefore set forth in the Findings hereof, and shall divest itself of all assets, properties, rights or privileges, tangible or intangible, including but not limited to, all plants, equipment, trade names, trademarks and goodwill acquired by said respondent as a result of the acquisition of the assets of the Clorox Chemical Company, together with the plant, machinery, buildings, improvements, equipment and other property of whatever description which has been added to them in such a manner as to restore it as a going concern in the manufacture and sale of household liquid bleach in which the said Clorox Chemical Company was engaged, in substantially the same productive capacity as was possessed by the said Clorox Chemical Company at, and immediately prior to, the time of the said acquisition by respondent The Procter & Gamble Company.

IT IS FURTHER ORDERED that by such divestiture none of the stocks, assets, rights, or privileges, tangible or intangible, acquired or added by respondent, shall be sold or transferred, directly or indirectly, to anyone who is at the time of divestiture, or for two years before said date was, a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with, or under the control, direction, or influence of respondent or any of respondent's subsidiary or affiliated corporations.

/s/ EVERETT F. HAYCRAFT,
EVERETT F. HAYCRAFT,
Hearing Examiner.

February 28, 1962.

Petition for Review

[Caption Omitted]

PETITION FOR REVIEW *

(Filed March 22, 1962)

To the Honorable Joseph W. Shea, Secretary:

The complaint in this proceeding, issued September 30, 1957, alleged that respondent The Procter & Gamble Company (hereinafter referred to as "Procter") had violated Section 7 of the Clayton Act as amended December 29, 1950 (64 Stat. 1125; 15 U.S.C. § 18) by acquiring on August 1, 1957 the assets and business of the Clorox Chemical Company. In its answer respondent denied all charges of illegality.

The taking of evidence in this proceeding commenced on December 16, 1957 and the hearings were initially concluded on February 12, 1959. On June 17, 1960 the Hearing Examiner rendered an Initial Decision in which he held that Procter had violated Section 7 of the Clayton Act. Both parties filed appeals to the Commission from that Initial Decision, and on March 14, 1961 the Commission heard argument on both appeals.

On June 15, 1961 the Commission issued its Order Remanding The Proceeding To The Hearing Examiner. The Commission's Order of Remand held that the record as then constituted did not provide an adequate basis for determining the legality of respondent's acquisition. The Order specified definite lines of additional inquiry for the purpose of providing "a more complete and detailed post-acquisition picture" which would allow "the Commission

* Under the circumstances of this proceeding, we are uncertain with respect to the application of the Commission's new and old Rules of Practice. We are, therefore, also filing our Notice of Intention to Appeal in accordance with Rule 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings, effective at the time the complaint was served in this proceeding.

Petition for Review

an informed hindsight upon which it can act." (Opinion of the Commission, p. 5)

While not waiving the objection to the legality of the Commission's Order of Remand,* respondent appeared at the further hearings before the Hearing Examiner, which were held on December 1, 1961 and on December 12, 1961. On December 12, 1961, counsel for both parties rested and the Hearing Examiner closed the taking of testimony. Thereafter, on February 28, 1962, the Hearing Examiner filed his "Second Initial Decision" in this proceeding in which he again held that Procter had violated Section 7 of the Clayton Act by acquiring the assets and business of the Clorox Chemical Company. This Decision was served upon respondent Procter on March 12, 1962.

Under these circumstances, we submit, the proceeding automatically comes before the Commission for review without the necessity of an appeal or request by either party. However, in an abundance of caution and without waiver of any rights, we hereby petition the Commission to review the Second Initial Decision of the Hearing Examiner in this proceeding.

At the hearings held before the Hearing Examiner on December 1, 1961, counsel for the Commission completely ignored the lines of additional inquiry spelled out by the Commission in its Order of Remand. Counsel for the Commission was content to introduce evidence merely purporting to show Clorox's post-acquisition promotional activities and certain market share statistical data. Counsel for the Commission did not introduce additional evidence relating to the following matters, among others, which the Commission had directed were to be explored:

* Respondent moved before the Hearing Examiner for dismissal on this ground, and herewith appeals from the denial of that motion.

Petition for Review

1. Whether, and to what extent, Procter's production facilities and techniques have been utilized by Clorox.
2. Whether any use had been made of Procter's sales force in place of independent brokers.
3. Whether any competitor of Clorox has been adversely affected by the acquisition.
4. Whether there had been any change in the grocer's allocation of shelf space to Clorox and its competitors.
5. Whether there had been any coordination of the advertising and promotion of Clorox with Procter's products.
6. Whether any use had been made of national television advertising in merchandising Clorox.

The burden was upon counsel in support of the complaint to offer any evidence on these matters. We respectfully submit that failure to introduce any evidence in connection either with these lines of inquiry or with other subjects referred to or indicated in the Commission's Order of Remand and accompanying Opinion compels the inference that evidence on these matters would not have established that the acquisition resulted in any adverse effect on competition.

Many of the matters as to which the Hearing Examiner has made findings in his Second Initial Decision have been foreclosed by the Commission's Order of Remand. In addition, many of the findings and conclusions are either inconsistent with the Commission's Order and accompanying Opinion, unsupported by the evidence or both. We appeal from such findings and conclusions and enumerate some of them below.

**The Questions Presented Upon Review
Include the Following**

1. Whether the evidence offered by counsel in support of the complaint at the hearings on remand is in accord-

Petition for Review

ance with the lines of additional inquiry set forth in the Commission's Order of Remand? Respondent contends that it is not.

2. Whether the evidence adduced at the hearings on remand supports any finding or conclusion that this acquisition has or probably will result in a substantial lessening of competition or tendency to monopoly in accordance with the criteria established by the Commission for determining the legality of this acquisition? Respondent contends that *the evidence does not support* any such finding or conclusion. More specifically there is *no evidence to support the related detailed findings* of the Hearing Examiner, including the following:

A. There is no proof that there was a decline in the pre-acquisition growth trend of Clorox which has been reversed.

B. There is no proof that the post-acquisition growth trend of Clorox is a direct response to promotional and advertising expenditures made by Clorox.

C. There is no proof that there has been an increase in the tendency of concentration of competition in the household liquid bleach.

D. There is no proof that there is a causal relationship between the size and experience of Procter and the market position of Clorox.

E. There is no proof that Procter's financial resources and experience in marketing its products will enhance the ability of Clorox to market its liquid bleach.

3. Whether there is any probative evidence that this acquisition may result in a substantial lessening of competition or tendency to monopoly? Respondent contends that there is none.

Order Granting Petition for Review

4. Whether the Hearing Examiner's proposed order of divestiture is justified by the evidence? Respondent contends that it is not justified.

It is respectfully submitted that under the circumstances here present, review by the Commission of this proceeding, involving in essence a case of first impression in the application of Section 7 of the Clayton Act, is in the public interest.

Respectfully submitted,

ROYALL, KOEGEL, HARRIS & CASKEY

By: /s/ KENNETH C. ROYALL
KENNETH C. ROYALL

Attorneys for Respondents

Dated: March 22, 1962

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, *Chairman*
SIGURD ANDERSON
WILLIAM C. KERN
PHILIP ELMAN
EVERETTE MACINTYRE

In the Matter of
THE PROCTER & GAMBLE COMPANY,
a corporation.

Docket
No. 6901

ORDER GRANTING PETITION FOR REVIEW

Counsel for respondent having filed on March 22, 1962, a petition for review of the initial decision of the hearing examiner in this proceeding pursuant to Section 4.20 of

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Order Directing Reargument

the Commission's Rules of Practice, and counsel supporting the complaint interposing no answer or objection thereto; and

The Commission having determined that said petition should be granted:

IT IS ORDERED that said petition for review of the hearing examiner's initial decision be, and it hereby is, granted.

By the Commission.

/s/ JOSEPH W. SHEA
JOSEPH W. SHEA,
Secretary.

[SEAL]

ISSUED: April 4, 1962

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, *Chairman*
SIGURD ANDERSON
PHILIP ELMAN
EVERETTE MACINTYRE
A. LEON HIGGINBOTHAM, JR.

In the Matter of
THE PROCTER & GAMBLE COMPANY,
a corporation.

Docket
No. 6901

ORDER DIRECTING REARGUMENT

This proceeding is before the Commission on respondent's appeal from the second initial decision of the hearing examiner. On appeal from the first initial decision of the hearing examiner, the Commission, on June 15, 1961, re-

Order Directing Reargument

manded the case to permit the introduction of additional evidence on the competitive effects of the challenged acquisition.

At oral argument of the second appeal on July 11, 1962, a question arose as to whether the remand order limited the scope of the issues before the Commission for determination. The Commission is of the view that, since the entire record of the case is now before it, its final decision and order should be based on the entire record, and not merely on evidence adduced before the examiner on the remand. In view of the question which has arisen as to the proper interpretation of the remand order, the Commission believes it desirable now to set that question at rest by scheduling a reargument of all contested issues of fact and law, presented by the entire record, before the full Commission. In the latter connection, the Commission has noted that only one of its present members participated in the issuance of its remand order of June 15, 1961, and that such member was not present at the oral argument on July 11, 1962. Reargument will remove any uncertainty as to the scope of the issues now before the Commission for determination, and will permit such determination to be made by all the members of the Commission as now constituted. Accordingly,

IT IS ORDERED that the appeal in this case be, and it hereby is, scheduled for reargument, on the basis of the entire record, on Wednesday, January 30, 1963, at 2:00 p.m., with an allowance of forty-five minutes to each side for presentation of argument.

By the Commission.

/s/ JOSEPH W. SHEA
JOSEPH W. SHEA,
Secretary.

[SEAL]

ISSUED: November 30, 1962

Motion to Dismiss the Complaint

[Caption Omitted]

MOTION TO DISMISS THE COMPLAINT

(Filed December 21, 1962)

Comes now the respondent, THE PROCTER & GAMBLE COMPANY, by its attorneys, and respectfully moves this Commission for an order vacating and setting aside this Commission's order for reargument, filed November 30, 1962, and for an order dismissing the complaint herein. This motion is made on the grounds that this Commission has failed to proceed with reasonable dispatch to conclude this proceeding in violation of Section 6(a) of the Administrative Procedure Act [5 U.S.C. § 1005(a)] and also for the reasons heretofore set forth in the respondent's motion to dismiss made before the Examiner upon the remand hearings herein and summarized in paragraph numbered 23 of a complaint filed by respondent in the United States District Court for the District of Columbia, which said complaint is annexed hereto and made a part hereof as Exhibit A.*

In support of this motion respondent shows:

1. The Commission's complaint in this proceeding was issued on September 30, 1957. The taking of testimony commenced in December 1957. The evidence was taken in various cities throughout the United States. Counsel for both parties were afforded the widest latitude in the presentation of testimony and documentary evidence. The hearings were concluded on February 12, 1959, when each party stipulated that its case was closed. The record at this time consisted of more than 6300 pages of transcript, plus several hundred exhibits.

* There were four exhibits annexed to such complaint. These consisted of papers which are on file with this Commission and have not been reproduced here.

Motion to Dismiss the Complaint

2. The Initial Decision of the Trial Examiner was filed on June 17, 1960. An appeal from this decision was taken to this Commission. On June 15, 1961, this Commission entered an order remanding this proceeding to the Hearing Examiner for the reception of certain additional evidence. Such remand was ordered by the Commission on its own motion and had not been applied for or sought by either party to the proceeding.

3. In its opinion this Commission plainly and unequivocally held that the record before it did not support the complainant's charges. It said: "*The record as presently constituted does not provide an adequate basis for determining the legality of this acquisition.*" * In other words, the complainant had failed to sustain its burden of making out a case.

4. Respondent maintained, and still maintains, that it was thereupon entitled to a dismissal of the proceeding. And, indeed, the Commission itself recognized the propriety of such a disposition. It said: "*In the circumstances we might dismiss the complaint. . .*"

5. Instead of following this proper course, the Commission held that on the remand the Examiner should consider post-acquisition evidence respecting events subsequent to the close of the original record. The stated purpose of such remand was to determine whether any such evidence supported the conjectures and speculations in which the Trial Examiner had indulged. As stated by this Commission, the remand was for the purpose of determining, in the light of hindsight, whether prophecies and unsupported guesswork as to probable anticompetitive results, had in fact been borne out.

6. The respondent thereafter instituted an action in the United States District Court for the District of Columbia,

* Emphasis supplied throughout unless otherwise indicated.

Motion to Dismiss the Complaint

by filing the complaint which is annexed hereto as Exhibit A. In said action respondent challenged the Commission's order of remand and asked that the remand hearings be temporarily and permanently enjoined and that the entire proceeding before the Commission be dismissed. The defendants in the action in the District Court were: (a) The Federal Trade Commission; (b) the members of the Commission, individually and as Commissioners; and (c) the Hearing Examiner. All were represented by the same counsel.

7. In said District Court action hearings were had upon respondent's application for a temporary restraining order to prevent the implementation of the remand. In answer to respondent's claims that the order of remand was burdensome, oppressive and unwarranted in the circumstances, and was violative of the Administrative Procedure Act and the Rules of this Commission, all of the defendants, through their counsel, urged upon the Court that the evidence to be submitted on the remand would be entirely documentary in nature; would be directed to the time period subsequent to the close of the evidence in the original record; and would be so presented as to make possible an early disposition of the proceeding. In this connection, the defendants, including the Commission and its five individual members, through counsel, stated to the District Court:

"The only evidence which will be offered on behalf of the Federal Trade Commission in the proceeding before that Commission bearing Docket #6901 will consist (except to the extent necessary in rebuttal to any evidence herein introduced by plaintiff) of documentary evidence all of which has been shown to plaintiff's counsel today, and a witness to authenticate such documents; and . . . that the introduction

Motion to Dismiss the Complaint

of such evidence will not consume more than two hearing days, December 1, 1961, and December 4, 1961."

8. Such statements were made for the avowed purpose of convincing the District Court that the remand would not impose any real burden on respondent and would not result in any appreciable protraction of the proceeding.

In reliance upon the foregoing statements and conditioned thereon, the District Court entered its order reading:

"Wherefore, it is on this 30th day of November, 1961, ordered that the motion for temporary restraining order is denied without prejudice." *

9. The hearing on the remand then proceeded. Additional evidence was adduced with respondent reserving all its rights. The court action was thereupon dismissed on the consent of all parties without prejudice.

10. One of respondent's basic complaints in the court action was that, in making the remand under the circumstances shown in the complaint, this Commission had violated § 6(a) of the Administrative Procedure Act [5 U.S.C. Section 1005(a)] which directed "every agency" to "proceed with reasonable despatch to conclude any matter presented to it." The representation to the Court by the attorney for this Commission and the individual Commissioners that complainant's proof would be concluded within two days could have no purpose or meaning other than that the Commission would proceed with dispatch to dispose of the matter before it.

11. Now a year has passed since said representation to the District Court and this proceeding has not been ter-

* The Examiner at the outset denied respondent's motions attacking the validity of the remand.

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Motion to Dismiss the Complaint

minated. On the contrary, although there has been another thorough briefing and submission to the Hearing Examiner, another decision by the Hearing Examiner, then another briefing and argument before this Commission, and another final submission to this Commission, there has been no final decision. Instead, this Commission on November 30, 1962—precisely one year after the representation to the District Court that there would be a prompt disposal of the proceeding—has set this case down for reargument on the entire record.

12. A considerable amount of further delay is envisaged. For, by its order for reargument, this Commission apparently contemplates a reargument and a reconsideration of the entire record. In addition, the order for reargument points out that the original record, prior to the first remand, had only been considered by one of the Commissioners presently sitting. This recital by the Commission means, we assume, that the entire voluminous initial record—with its thousands of pages—must be considered by four Commissioners who have no acquaintance therewith. For surely the Commissioners unacquainted with the record would feel required fully to familiarize themselves therewith. Accordingly, the end of this proceeding is not in sight.

13. This Commission's ostensible reason for ordering reargument, to wit, a change in the personnel of the Commission, does not, we submit, present an appropriate cause for violating the Administrative Procedure Act. Administrative proceedings may not be endlessly prolonged merely because of changes in Commission personnel. Indeed, the argument runs in a vicious circle. The more the proceedings are prolonged—as by the original remand herein—the greater is the likelihood that changes in personnel will take place. And such changes, in turn, are

Motion to Dismiss the Complaint

now made a reason for still further delay. We repeat—this proceeding should have been disposed of upon the first appeal to the Commission, where it was specifically held that the record established no violation of Section 7.

14. In any event, this Commission has no power at this time to reconsider the record made prior to the remand. Having found that record insufficient to sustain the complaint, the proceeding may not be reopened generally without compliance by the Commission with its own Rule 3.27 dealing with the reopening of proceedings.* No compliance with that rule has been even attempted.

15. As shown in the District Court complaint, Exhibit A annexed hereto, the long drawn out proceeding has already cost respondent tremendous sums of money. The continued pendency of the proceeding has resulted in a portion of respondent's business being operated in an atmosphere of doubt and uncertainty.

16. This Commission has recognized that remand after full trial "is costly, time-consuming and, to some extent, harassing to respondents" (*Modern Methods, Inc. and Harold Brooks*, Dkt. 7568). In the present case the remand followed by this order for reargument makes the foregoing language applicable *a fortiori*.

17. The Commission's actions in this proceeding, taken as a whole and including the present order for reargument, not only violates the reasonable dispatch provisions of the Administrative Procedure Act, but violates its own rules respecting the conduct of proceedings and the constitutional requirements of due process of law, as more fully alleged in Exhibit A annexed hereto.

18. This Commission has shown in the past that it is profoundly interested in the integrity and fairness of its

* This citation is to the "old" rules of this Commission. The substance of Rule 3.27 is now embodied in Rule 5.7.

Motion to Dismiss the Complaint

own processes. Indeed, the failure to conduct a proceeding with fairness has led to a dismissal of the complaint. See *Modern Methods, Inc. and Harold Brooks*, Dkt. 7568.

WHEREFORE it is respectfully submitted that this Commission should now put an end to this already long and overextended proceeding and dismiss the complaint herein. By so doing it would establish that it proposes to conduct matters before it in such fashion as gives full effect to the rules of law under which it functions, as well as the rules which the Commission itself has promulgated.*

Respectfully submitted,

KENNETH C. ROYALL,
FREDERICK W. R. PRIDE,
ROBERT D. LARSEN,

By /s/ KENNETH C. ROYALL,
Attorneys for Respondent

THE PROCTER & GAMBLE COMPANY

Dated: December 21, 1962.

* See In the Matter of Chain Institute, Inc., Docket No. 4878, where in denying respondent's motion to reargue a matter before the Commission because of changes in the Commission's personnel, this Commission stated,

"... A judge appointed to fill a vacancy on the bench does not set about to reopen and retry previously adjudicated cases simply because he is a new member.

"The machinery of the quasi-judicial agency, like the courts, contemplates a continuing process; it looks to current litigation, not past litigation. If our procedures were otherwise, delay and inaction would surround enforcement of the statutes committed to the Commission's jurisdiction. To grant the present motion would be to require a third review of a voluminous record made many years ago."

[Exhibit A attached to the "Motion to Dismiss the Complaint" is reproduced at page 467a of the Joint Appendix.]

*Order Denying Motion to Vacate Order*UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, *Chairman*
SIGURD ANDERSON
PHILIP ELMAN
EVERETTE MACINTYRE
A. LEON HIGGINBOTHAM, JR.*In the Matter of*
THE PROCTER & GAMBLE COMPANY,
a corporation.Docket
No. 6901ORDER DENYING MOTION TO VACATE ORDER
FOR REARGUMENT AND TO DISMISS
THE COMPLAINT

Upon consideration of respondent's motion, filed December 21, 1962, for an order vacating the Commission's order directing reargument filed November 30, 1962, and for an order dismissing the complaint herein, and

The Commission having previously determined, for the reasons stated in its order directing reargument, that reargument of this matter before the full Commission is in the public interest and will facilitate prompt and comprehensive determination of the case,

IT IS ORDERED that the motion be, and it hereby is, denied.

By the Commission.

[SEAL]

/s/ JOSEPH W. SHEA,
JOSEPH W. SHEA,
Secretary.

ISSUED: January 2, 1963

*Final Order***UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION****Commissioners:**

PAUL RAND DIXON, *Chairman*
SIGURD ANDERSON
PHILIP ELMAN
EVERETTE MACINTYRE
A. LEON HIGGINBOTHAM, JR.

In the Matter of
THE PROCTER & GAMBLE COMPANY,
a corporation.

**Docket
No. 6901**

FINAL ORDER

This matter has been heard by the Commission on respondent's appeal from the initial decision of the hearing examiner filed on February 28, 1962. The Commission has rendered its decision, denying the appeal in all respects, and adopting the findings of fact and conclusions of law made by the hearing examiner to the extent consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

IT IS ORDERED that:

I.

Respondent, The Procter & Gamble Company, a corporation, and its officers, directors, agents, representatives,

Final Order

employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, shall divest, absolutely and in good faith, all assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks and good will, acquired by The Procter & Gamble Company as a result of the acquisition by The Procter & Gamble Company of the assets of Clorox Chemical Company, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Clorox Chemical Company since the acquisition.

II.

By such divestiture, none of the assets, properties, rights or privileges, described in paragraph I of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, respondent or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of The Procter & Gamble Company, or to any purchaser who is not approved in advance by the Federal Trade Commission.

III.

If respondent divests the assets, properties, rights and privileges, described in paragraph I of this order, to a new corporation or corporations, the stock of each of which is wholly owned by The Procter & Gamble Company, and if respondent then distributes all of the stock in said corporation or corporations to the stockholders of The

Final Order

Procter & Gamble Company, in proportion to their holdings of The Procter & Gamble Company stock, then paragraph II of this order shall be inapplicable, and the following paragraphs IV and V shall take force and effect in its stead.

IV.

No person who is an officer, director or executive employee of The Procter & Gamble Company, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of The Procter & Gamble Company, shall be an officer, director or executive employee of any new corporation or corporations described in paragraph III, or shall own or control, directly or indirectly, more than one (1) percent of the stock of any new corporation or corporations described in paragraph III.

V.

Any person who must sell or dispose of a stock interest in The Procter & Gamble Company or the new corporation or corporations, described in paragraph III, in order to comply with paragraph IV of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation or corporations is made to stockholders of The Procter & Gamble Company.

VI.

No method, plan or agreement of divestiture to comply with this order shall be adopted or implemented by respondent save upon such terms and conditions as shall first be approved by the Federal Trade Commission.

VII.

As used in this order, the word "person" shall include all members of the immediate family of the individual

Opinion of the Commission

specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

VIII.

Respondent shall periodically, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this order and fulfilling its objectives.

By the Commission, Commissioner Anderson concurring in the result.

[SEAL]

/s/ JOSEPH W. SHEA,
JOSEPH W. SHEA,
Secretary.

ISSUED: November 26, 1963

[Caption Omitted]

OPINION OF THE COMMISSION

BY COMMISSIONER ELMAN:

The Commission's complaint, issued on September 30, 1957, charged that respondent's acquisition on August 1, 1957, of all the assets of Clorox Chemical Company violated Section 7 of the Clayton Act, as amended (15 U. S. C. § 18). After extended hearings, the hearing examiner rendered an initial decision in which he found the acquisition unlawful and ordered divestiture. On appeal, the Commission, concluding "that the record as presently constituted does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition . . . on competition," and hence that the record "should be supplemented in this respect to the

Opinion of the Commission

end that all of the issues involved in the case may be finally and conclusively disposed of on their merits," ordered on June 15, 1961, that the initial decision be vacated, that the case be remanded to the hearing examiner for the reception of additional evidence, and "that after receipt of such additional evidence the hearing examiner make and file a new initial decision on the basis of the entire record herein."

On remand, additional evidence was introduced, and the hearing examiner rendered a second initial decision in which he again found the acquisition unlawful and ordered divestiture. In the course of oral argument on July 11, 1962, before the Commission on appeal from this decision, a question was raised whether the Commission was free to decide the case on the basis of the entire record, or whether it must assume that the record on the first appeal did not support a finding of illegality and confine its attention to the additional evidence introduced on remand. The Commission, believing that the public interest required that the case be decided on the entire record, directed reargument of all contested issues of fact and law (order of November 30, 1962). Reargument was held on January 30, 1963. The case is now ready for final decision on the entire record.

I. "Law of the Case"

We meet at the threshold the contention that notwithstanding the Commission's order of reargument, in which its intention to consider the issues of this case on the entire record was clearly announced, such a course is barred by the principle of "law of the case." The principle, that an appellate tribunal will not reconsider its own rulings of law on a subsequent appeal in the same case, is not, we think, applicable here.

Opinion of the Commission

The language of the Commission's order of remand, quoted above, should dispel any inference that a ruling on the sufficiency of the evidence to support the complaint was intended. The basis of the order, in fact, was that the record was inadequate for the making of any ruling, and hence required supplementation; decision of all the issues of the case was expressly postponed by the Commission pending receipt of the additional evidence; and the hearing examiner was directed to file a new initial decision on the basis of the entire record.

It is true that in its opinion accompanying the order of remand, the Commission expressed the view that the post-acquisition data on which the hearing examiner had relied heavily in his first initial decision did not support the examiner's finding of illegality. However, even if this tentative expression of opinion be deemed a ruling of law, plainly it affected only a single, narrow aspect of the case. Inasmuch as the post-acquisition evidence introduced in this case is not a material factor in our decision (see JA 461a-462a), whatever ruling the Commission may earlier have made as to the relevance or sufficiency of such evidence to support a finding of illegality is, at this point, moot.

In any event, the doctrine of law of the case is not an inexorable command, but "only a discretionary rule of practice." *United States v. United States Smelting, Refining & Mining Co.*, 339 U. S. 186, 199; see Note, 65 Harv. L. Rev. 818, 822 (1952). Every consideration of fairness and of the public interest weighs in favor of our now deciding this case on the entire record. For one thing, only one of the present members of the Commission (Commissioner Anderson) participated in the decision of the first appeal. It would be a forced and unnatural exercise for us to consider the evidence introduced on remand in isolation

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from the rest of the record or attempt to divine how our predecessors would have reacted to that additional evidence. If we are to decide this case fairly and rationally, we must be free to draw our own inferences from the entire record.

In addition, it is a widely recognized basis for relaxing application of the doctrine of law of the case that the law has changed in the interim. Note, *supra*, at 822, n. 15. The expressions of opinion accompanying the order of remand were based on the view that post-acquisition evidence is crucial in a case of this sort—a view which has been undermined, if not rejected, by two supervening decisions of the Supreme Court (see discussion at JA.423a-428a). Accordingly, we feel free to consider the issues of this case unfettered by the observations made in the earlier opinion.

Nor can respondent argue that it has been unfairly surprised by being compelled to argue the case on the entire record. It was to eliminate any such possibility of unfairness that the Commission ordered reargument and gave the parties full opportunity to brief and argue the case on the entire record.

The consequence of the Commission's order of remand has been a regrettable delay in the final disposition of an already protracted litigation. However, delays of this kind are perhaps inevitable where, as here, difficult questions of law are presented which the courts have not authoritatively resolved. In any event, the remedy for such delays is not decision of the case in a truncated posture, but clarification of the issues through reasoned decision on the entire record.

II. The Facts and Background

The complaint alleges that the effect of the acquisition by respondent, The Procter & Gamble Company (Procter), of the assets of Clorox Chemical Company (Clorox), "may

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be substantially to lessen competition, or to tend to create a monopoly," in the manufacture of household liquid bleach throughout the nation.

Household liquid bleach is a 5¼% sodium hypochlorite solution which is used in the home as a germicide and disinfectant and, more importantly, as a whitener in the washing of clothes and fabrics. To a certain extent, the use of household liquid bleach overlaps that of other products, especially powdered bleach; also, liquid bleach in somewhat stronger solution has industrial uses. Nevertheless, the parties appear to agree that household liquid bleach is a distinctive product, recognized as such by the consumer and by the trade, and that it has no close substitutes (see JA 429a).

At the time of the acquisition, Clorox was the nation's leading manufacturer of household liquid bleach. Its annual sales of slightly less than \$40,000,000 represented almost 50% of the national total,¹ and its market share had been growing steadily for at least five years prior to the acquisition.

*Market Shares of Household Liquid Bleach Manufacturers
(Consumer Dollar Basis)*

<i>Brand</i>	<i>Percentage of Total U. S. Sales</i>
Clorox	48.8
Purex	15.7
Roman Cleanser	5.9
Fleecy White	4.0
Hilex	3.3
Linco	2.1
Total	79.8
All Other Brands	20.2

¹ Complaint counsel and respondent's counsel have stipulated the accuracy of the A. C. Nielsen Food Index, a compendium of statistics on the sales volume of various grocery products. The Index gives the following picture of household liquid bleach sales in 1957:

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As the table in note 1 shows, Clorox's principal competitor is the Purex Corporation. Unlike Clorox, which is engaged almost exclusively in the manufacture of household liquid bleach, Purex manufactures a number of products, including an abrasive cleanser (Old Dutch Cleanser), a toilet soap (Sweetheart), and detergents (Trend and News). Total sales of all its products were approximately \$50,000,000 in 1957.

The table shows that in 1957 Clorox and Purex between them accounted for almost 65% of the nation's household liquid bleach sales, and, together with four other manufacturers, for almost 80%. The remaining 20% was divided among 132 listed (in Dun & Bradstreet), and a number of unlisted (roughly 91), small producers. (These figures may be somewhat overstated.) In addition, there seems to be a large number of extremely small, so-called "garage" or "down-cellar" bleach producers. Only eight manufacturers of liquid bleach have assets of more than \$1,000,000; very few, in fact, have assets of more than \$75,000.

Most manufacturers of household liquid bleach sell at least part of their production to grocery stores and supermarkets for resale to the consumer under the stores' own brand name. These private or house brands, however, appear to account for only a small proportion of the total sales of liquid bleach.² Clorox sells no private brand liquid bleach—all of Clorox's bleach is sold under the "Clorox" brand name—and Purex very little.

The equipment, raw materials and labor required in the manufacture of liquid bleach are relatively inexpensive, and neither the product nor its process is the subject of a patent or trade secret. However, owing to its weight, to

² In the Nielsen Index, the private brand production of all manufacturers is included in the 20.2% residual category. The Safeway supermarket chain is evidently the only retailer of household liquid bleach that actually manufactures its private brand.

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its low sales price per unit, and to the fact that it is ordinarily sold in bottles, household liquid bleach is expensive to ship. Freight, which the manufacturer pays for—the liquid bleach industry uniformly sells on a delivered-price basis—, commonly averages more than 10% of unit cost. For this reason, household liquid bleach cannot profitably be distributed outside a radius of perhaps 300 miles from the point of manufacture. Most manufacturers, since they have only a single plant, are limited to a regional market. Indeed, Clorox, which has 13 plants distributed throughout the country, is the only producer selling on a national scale. Although Purex has as many plants as Clorox, it does not distribute its bleach in the northeast or middle-Atlantic states. In 1957, Purex bleach was available in less than 50% of the national market. The other manufacturers of liquid bleach are still more limited territorially.³

As a result of the territorial limitations of Clorox's competitors, the percentage figures in the table in note 1 do not give an adequate picture of Clorox's position in the various regions of the country. For example, Clorox's seven principal competitors did no business in New England, metropolitan New York or the middle-Atlantic states, and Clorox's share of the liquid bleach sales in these areas was 56%, 64%, and 72%, respectively. Even in areas where the principal competitors of Clorox were active, Clorox's share of total liquid bleach sales was high. Except in metropolitan Chicago and the west-central states, Clorox accounted for at least 39%, and often for a much higher percentage, of liquid bleach sales in the various regions.

It is not immediately apparent how Clorox was able to obtain a leading position in the household liquid bleach in-

³ For example, 60% of the sales of Linco, the sixth-largest-selling liquid bleach brand (see note 1, *supra*), are made in metropolitan Chicago. There was evidence that some liquid bleach brands are marketed only in the Italian neighborhoods of New York City.

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dustry. Clorox is not sold to the consumer at a lower price than other bleaches; on the contrary, it is a premium brand that commonly sells for several cents per quart more than regional, local or private brands. Nor is Clorox a better bleach than other brands; all household liquid bleaches are chemically identical. Nor is the industry plagued by inadequate productive capacity or shortages; none of Clorox's competitors is producing at full capacity, and, as was mentioned earlier, the manufacturing process is relatively simple and inexpensive.

The explanation seems to lie in the way in which household liquid bleach is marketed. It is a low-price, high-turn-over consumer product sold mainly to housewives in grocery stores. As a consequence of the growth of the self-service grocery store or supermarket, the consumer is no longer dependent upon the storekeeper's advice in purchasing commonly used, inexpensive household items such as liquid bleach. The housewife purchases the brand that she sees displayed prominently on the shelf or that is familiar and attractive to her by reason of advertising or sales promotions. Since the amount of shelf space that the grocer gives a particular brand is largely a function of the sales volume of the brand, it is apparent that the success of a particular brand of liquid bleach depends upon the manufacturer's successfully pre-selling it, whether by means of attractive packaging, a low price, advertising and sales promotion efforts, or otherwise. Cf. *United States v. Lever Bros. Co.*, 216 F. Supp. 887, 893 (S.D.N.Y. 1963).

Prior to its acquisition by Procter, Clorox had not been active in "sales promotions," a term which embraces such selling devices or gimmicks as price-off labels, two-for-one offers, coupons, free samples, premiums and contests. But it had advertised extensively. In 1957, for example, Clorox spent \$1,750,000 for newspaper advertising, \$560,000 for

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magazine advertising, \$258,000 for radio and billboard advertising, and \$1,150,000 for television advertising. Advertising expenditures, thus, were equal to almost 10% of total sales.

As a result of Clorox's long-continued mass advertising, its trade name had become widely known to and preferred by the consumer notwithstanding its high price and lack of superior quality. Most manufacturers of liquid bleach lack the financial resources to advertise or promote extensively. Purex, it is true, is a large advertiser, but its advertising—and *a fortiori* that of Clorox's lesser competitors—is very possibly less effective than Clorox's because of Purex's territorially limited distribution. It is apparent that the effectiveness of advertising in media of mass circulation normally is enhanced if the product is sold nationally. See, e.g., Bain, *Advantages of the Large Firm: Production, Distribution, and Sales Promotion*, 20 J. of Marketing 336, 340, 344 (1956). Obviously, it is relatively inefficient to pay for national advertising coverage, e.g., in national magazines or network television, without having national distribution of the advertised product. In general, moreover, it is rarely possible to adjust the dissemination of an advertising message to the precise bounds of the territory in which the advertised product is distributed. In addition, in a nation such as ours, which has a very mobile population, a brand obtainable by the consumer in every part of the country is likely to be better known than and preferred to a product marketed only regionally or locally.

The allegiance to a particular brand that is created by mass advertising and promotion tends, in the case of low-cost, high-turnover household products, to be somewhat ephemeral; the housewife is easily lured from her accustomed brand by promotional and advertising efforts on the part of rival manufacturers. The record in this case con-

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tains a graphic illustration of the volatile quality of consumer brand preferences. In Erie, Pennsylvania, Purex launched a major "attack" on Clorox's theretofore entrenched position (Clorox enjoyed more than 50% of the sales in the area) by marketing Purex liquid bleach in a new container and by promoting the "improved" product intensively by means of price-off labels and coupons. Within a few weeks, Purex, which previously had done no business in the area, had won a market share of more than 30%. Clorox immediately counter-attacked, however, and, by means of strenuous promotional efforts (consisting of price-off and premium offers), coupled with intensive advertising, soon forced Purex's share down to 7%.

At the time of its acquisition of Clorox, Procter was one of the nation's 50 largest manufacturers, with total net sales in 1957 of \$1,156,000,000. Procter manufactures a wide range of low-priced, high-turnover household consumer items sold through grocery, drug and department stores,⁴ but prior to the acquisition of Clorox, it did not produce household liquid bleach. Procter's major locus of activity is in the general area of soaps, detergents and

⁴ In the answer to the complaint, respondent offered the following "list of the most important brands sold by respondent": "Soaps, Detergents and Cleansers: Ivory Soap—all-purpose bar soap; Ivory Flakes—mild all-purpose flake soap; Ivory Snow—mild all-purpose granulated soap; Camay—hard-milled perfumed toilet soap; Lava—pumice hand soap; Duz—detergent and granulated soap; Tide—heavy-duty detergent; Cheer—heavy-duty detergent; Dreft—light-duty detergent; Oxydol—heavy-duty detergent; Dash—low sudsing heavy-duty detergent; Joy—liquid general purpose detergent; Comet—scouring cleanser; Cascade—detergent for automatic dishwashers; Spic and Span—paint and linoleum cleaner; Zest—detergent toilet bar; Food Products: Crisco—vegetable shortening; Golden Fluff—vegetable and lard shortening; Big Top—peanut butter and peanuts; Duncan Hines—prepared baking mixes—15 kinds; Toilet Goods: Crest—fluoridated toothpaste; Gleem—toothpaste; Drene—liquid shampoo; Prell—paste and liquid shampoo; Shasta—cream shampoo; Lilt—home permanent; Pin-It—home permanent; Paper Products: Charmin—household toilet tissue; Lady Charmin—household toilet tissue; Charmin—facial tissue; Charmin—paper napkins; Charmin—paper towels; Evergreen—industrial paper towels and tissue. On a consumer dollar basis, Procter in 1957 had 31% of the nation's total sales of toilet soap; 32%, dentifrices; 30%, lard and shortening combined; 19%, shampoo; and see p. 12 below.

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cleansers.* In 1957, of total domestic sales, more than one half (\$514,000,000) were in this field. In packaged detergents alone,⁶ Procter's sales were \$414,000,000, and this was 54.5% of the national total. In the household cleansing agents industry, Procter's principal competitors are Colgate-Palmolive and Lever Brothers. Together, these three firms account for more than 80% of total sales. Procter is the leading firm of the three. In 1957, total sales of Colgate-Palmolive and Lever Brothers were \$291,000,000 and \$250,000,000, respectively. There are no other firms in the industry of comparable size. Purex was the next largest after the "Big Three," with sales, as was noted earlier, of about \$50,000,000 in 1957, followed by B. T. Babbitt, Inc., with sales of less than \$22,000,000.

In the marketing of soaps, detergents and cleansers, as in the marketing of household liquid bleach, extensive advertising and sales promotion seem to be the key to success. Procter is one of the nation's leading advertisers: In 1957, it spent upwards of \$80,000,000 on advertising (principally television advertising) in the United States, and was, in fact, the nation's largest advertiser in that year. In addition, it spent \$47,000,000 for domestic sales promotions alone. (Procter's total domestic sales in 1957 were approximately \$900,000,000.) Colgate-Palmolive and Lever Brothers, Procter's principal competitors, also rank high among the nation's largest advertisers.

The record in this case contains a striking example of the role of advertising and promotion in the household cleansing agents industry. In 1957, Procter introduced a

* Soaps, detergents and cleansers, we shall call, for the sake of simplicity, "household cleansing agents." The term is meant to exclude mops, waxes, polishes, brooms and other such relatively high-priced, specialty items used in household cleaning.

⁶ The term "packaged detergents" embraces heavy-duty high-sudser detergents, heavy-duty low-sudser detergents, heavy-duty soaps, heavy-duty liquids, light-duty synthetics, light-duty liquids, and light-duty soaps.

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new abrasive cleanser, which it called "Comet." Over a 22-month period, Procter spent \$7,200,000 for the advertising and sales promotion of Comet; 20 months after it first appeared on the market, Comet had attained 36.5% of the national market in abrasive cleansers. (The abrasive cleansers industry had total sales of \$53,000,000 in 1957—somewhat more than one-half the total sales of household liquid bleach in that year.) It would appear that Comet's success is traceable mainly to the intensive advertising and promotional efforts made on its behalf. (See generally *United States v. Lever Bros. Co.*, 216 F. Supp. 887 (S.D. N.Y. 1963); Klaw, "The Soap Wars: A Strategic Analysis," *Fortune*, June 1963, p. 122.)

Procter's acquisition of Clorox was the culmination of two years of study of the liquid bleach industry undertaken by its promotion department in order to determine the advisability of Procter's entering the industry. The first report from the promotion department observed that liquid bleach accounted for 90% of the large and expanding household bleach market and predicted that its ascendancy over powdered bleach would continue in the foreseeable future. The report, however, recommended not that Procter attempt to market its own brand of bleach, as it had repeatedly and successfully done with other household products, but rather that it purchase Clorox. Since, the report advised, "a very heavy investment" would be required for Procter to obtain a satisfactory market share for a new brand of liquid bleach, entry into the industry through acquisition of its leading firm was an attractive alternative. "Taking over the Clorox business . . . could be a way of achieving a dominant position in the liquid bleach market quickly, which would pay out reasonably well." The report predicted that Procter's "sales, distributing and manufacturing setup" could increase Clorox's share of the

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market in certain areas where it was low and effect a number of savings that would increase the profits of the business considerably.

A subsequent report from the promotion department confirmed the earlier recommendation, emphasizing that Procter management would be able to make more effective use of Clorox's advertising budget and that the merger would enable advertising economies.

A few months after the second report was filed, Procter acquired the assets of Clorox in the name of a wholly owned Procter subsidiary, The Clorox Company, in exchange for stock of Procter having a market value of approximately \$30,300,000.¹ At the time of the exchange, Clorox's assets were valued at \$12,600,000.

Since the acquisition, the top management of Clorox has been placed in the hands of Procter officials, and some degree of integration of Clorox and Procter activities has taken place (see JA 463a). By and large, however, Clorox has been operated as a separate entity within the Procter organization.

III. The Legality of the Merger Under Section 7

A. CATEGORIES OF MERGERS

The hearing examiner, respondent, and complaint counsel concur in describing the merger of Clorox and Procter as "conglomerate." This term, far from denoting a homogeneous class of mergers, tells us only that the instant merger is neither conventionally "horizontal" nor conventionally "vertical." An analysis of each of these terms is

¹ The Procter shares received in the exchange were distributed to Clorox's shareholders, whereupon Clorox Chemical Company was dissolved. We shall refer loosely to the entire transaction as the merger of Clorox and Procter or the acquisition of Clorox by Procter.

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necessary before we proceed further in the discussion of this case.

A horizontal merger, as ordinarily understood, is one between firms that make or sell the same product, or products which are close substitutes for each other. However, unless the firms actually operate within the same geographical market, the merger will have no immediate impact upon the market share of the acquiring firm—the hallmark of a conventional horizontal merger. Where the merger involves companies selling in different geographical markets (or, what may amount to the same thing, to different customer classes, cf. *Brillo Mfg. Co.*, F. T. C. Docket 6557 (decided July 31, 1963)), we have what has been termed a market-extension merger. See *Foremost Dairies, Inc.*, F. T. C. Docket 6495 (decided April 30, 1962). It may be a merger in which the acquired firm sells the same product as the acquiring firm and is a prospective entrant into the geographical market occupied by the acquiring firm. See *United States v. El Paso Natural Gas Co.*, 1962 CCH Trade Cases ¶ 70571 (D. Utah), prob. juris. noted, 373 U. S. 930; *Foremost Dairies, Inc.*, *supra*, pp. 48-49. Or the acquiring firm may be a prospective entrant into the market of the acquired firm. *Foremost Dairies, Inc.*, *supra*, pp. 49-50.

Another variant of the conventional horizontal merger is the merger of sellers of functionally closely related products which are not, however, close substitutes. This may be called a product-extension merger. The expression "functionally closely related," as used here, is not meant to carry any very precise connotation, but only to suggest the kind of merger that may enable significant integration in the production, distribution or marketing activities of the merging firms. An example of a merger enabling integration at the production level would be the merger of a liquid

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bleach with a liquid starch manufacturer; the manufacturing processes involve many of the same raw materials and equipment. Integration at the level of physical distribution might occur in the case of products which, for example, are shipped together. Integration at the marketing level (including integration of advertising and sales-promotion activities) might result where products manufactured by the merging firms are sold to the same customers or through the same outlets, or are actually complementary.*

A vertical merger, conventionally understood, is one between firms at different points on the same chain of distribution, that is, firms which actually or potentially are in the relationship of supplier and customer. Rather similar effects on competition, however, may result from a merger involving the acquisition not of a supplier but of a supplier's supplier.* And effects akin to the "reciprocity" which such a merger fosters may flow from any merger involving firms that deal in common with other firms. Thus, the merger of two firms having common marketing outlets might facilitate tie-in or full-line forcing agreements.

Only when the various subcategories of horizontal and vertical mergers have been exhausted (and the foregoing discussion of such subcategories is intended to be suggestive

* See Hale, *Diversification: Impact of Monopoly Policy Upon Multi-Product Firms*, 98 U. Pa. L. Rev. 320, 331-32 (1950). A complementary relationship between products exist "when a rise in the consumption or purchases of one cause a rise in the demand for the other. . . ." Boulding, *Economic Analysis* 226 (3d ed. 1955). See *United States v. Winlow*, 227 U.S. 202. See generally Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19 (1957). It has been suggested that a multi-product firm's activities be termed "divergent" when integration is enabled at the production level and the products are sold in different markets, and "convergent" when the products, though made through different processes, are sold through the same channels, by the same marketing techniques, or to the same customers. Thorp & Crowder, *The Structure of Industry* 146 (T.N.E.C. Monograph No. 27, 1941).

* See *Consolidated Foods Corp.*, F.T.C. Docket 7000 (decided November 15, 1962). Cf. Bigness and Concentration of Economic Power—A Case Study of General Motors Corporation, Staff Rep. of the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, 84th Cong., 2d Sess. 41 (1956).

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only) do we reach the true diversification or conglomerate merger, involving firms which deal in unrelated products. Cf. H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949). An extreme example might be the purchase of a newspaper kiosk in New York by a bakery in California.

The merger of Clorox and Procter may most appropriately be described as a product-extension merger. Packaged detergents—Procter's most important product category—and household liquid bleach are used complementarily, not only in the washing of clothes and fabrics, but also in general household cleaning, since liquid bleach is a germicide and disinfectant as well as a whitener. From the consumer's viewpoint, then, packaged detergents and liquid bleach are closely related products. But the area of relatedness between products of Procter and of Clorox is wider. Household cleansing agents in general, like household liquid bleach, are low-cost, high-turnover household consumer goods marketed chiefly through grocery stores and pre-sold to the consumer by the manufacturer through mass advertising and sales promotions. Since products of both parties to the merger are sold to the same customers, at the same stores, and by the same merchandising methods, the possibility arises of significant integration at both the marketing and distribution levels.

The functional relationship between household liquid bleach and products manufactured by Procter appears to hold even if we look beyond household cleansing agents to the food, paper and toilet products which round out the Procter line. They are also low-cost, high-turnover household consumer goods which are sold largely, although not entirely, through grocery stores and are heavily advertised and promoted.

By this acquisition, then, Procter has not diversified its interests in the sense of expanding into a substantially dif-

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ferent, unfamiliar market or industry. Rather, it has entered a market which adjoins, as it were, those markets in which it is already established, and which is virtually indistinguishable from them insofar as the problems and techniques of marketing the product to the ultimate consumer are concerned. As a high official of Procter put it, commenting on the acquisition of Clorox, "While this is a completely new business for us, taking us for the first time into the marketing of a household bleach and disinfectant, we are thoroughly at home in the field of manufacturing and marketing low priced, rapid turn-over consumer products."

B. GENERAL PRINCIPLES IN THE INTERPRETATION AND APPLICATION OF SECTION 7

The lawfulness, under Section 7 of the Clayton Act, as amended, of the kind of merger involved in the instant case, is a question largely of first impression. In general, the conglomerate merger (in the broad sense of that term) has received little attention under the antitrust laws.¹⁰ Its history of neglect appears to be due, first, to the erroneous view that Section 7 in its original form applied only to horizontal mergers¹¹—a view which stultified enforcement of the antitrust laws against conglomerate mergers until the amendment of Section 7 in 1950—and, secondly, to economists' preoccupation with the number and size dis-

¹⁰ The problems of conglomerate power occasionally arise, however, in the context of other provisions of the antitrust laws. See *United States v. Griffith*, 334 U.S. 100; *United States v. Swift & Co.*, 286 U.S. 106; *United States v. Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960); *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, 15 F.2d 678 (4th Cir. 1926); cf. *United States v. E. I. duPont de Nemours & Co.*, 188 Fed. 127 (Cir. Ct. D. Del. 1911).

¹¹ This view was ultimately rejected by the Supreme Court in *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 313, n. 21.

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tribution of firms in a single market.¹² But at the same time that the conglomerate merger was being ignored by lawyers and economists, businessmen were resorting to it increasingly as a mode of corporate expansion. Today, many, perhaps most, mergers involving substantial firms are conglomerate, and concern has begun to be voiced.¹³

The absence of authoritative, specific precedents in this area compels us to look to basic principles in the interpretation and application of Section 7. The Commission and the federal courts have now had the benefit of more than a decade of enforcement of the amended Section 7, and the numerous decisions construing the statute include two by the Supreme Court. To the principles which have emerged, we turn for guidance in the instant case.

First. All mergers are within the reach of the amended Section 7, whether they be classified as horizontal, vertical

¹² See, e.g., such assertions as, "The fact is that a truly conglomerate merger cannot be attacked in order to maintain competition, because it has no effect on market structure." Adelman, *The Antimerger Act*, 1950-60, 51 Am. Econ. Rev., 236, 243 (Papers and Proceedings, 1961). Cf. *United States v. Winslow*, 227 U.S. 202, 217. For a pathfinding study of the problems of the conglomerate merger under the amended Section 7, see Neal, *The Clayton Act and the Transamerica Case*, 5 Stan. L. Rev. 179 (1953).

¹³ "In a word then, we find that the antitrust laws have failed to stem the horizontal and vertical merger movements of the 1890's and the 1920's, and have had no deterrent effect on the conglomerate merger movement of the 1950's and 1960's." Houghton, *Mergers, Superconcentration, and the Public Interest*, in *Administered Prices: A Compendium on Public Policy* 152, 158 (Comm. Print 1963). See Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in *id.*, at 109-10, 130; Federal Trade Commission, *Report on Corporate Mergers and Acquisitions*, 50-51, 54 (1955); *Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms*, Staff Rep. of the H. Select Comm. on Small Business, 87th Cong., p. 44 (Comm. Print 1962). A suggestive statistic in this connection is that between 1947 and 1958, the 50 largest manufacturing firms in the nation increased their share of total value added by manufacture from 17% to 23%; the top 100, from 23% to 30%; the top 150, from 27% to 35%; and the top 200, from 30% to 38%. *Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms*, *op. cit. supra*, at 13. See also Collins & Preston, *The Size Structure of the Largest Industrial Firms, 1909-58*, 51 Am. Econ. Rev. 989 (1961). One economist has suggested that the increasing concentration of the nation's industrial assets in the hands of large firms is attributable to the conglomerate-merger movement. Houghton, *supra*, at 154-55.

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or conglomerate, and all are to be tested by the same standard. This is plain not only from the statutory language, but from the legislative history as well: "[T]he bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly."¹⁴ The inclusion of conglomerate mergers within the scope of the statute cannot be dismissed as casual or inadvertent. This Commission's Report on the Merger Movement (1948), which played an important role in the deliberations leading to the amendment of Section 7, had emphasized the dangers presented by conglomerate mergers: "[T]here are few greater dangers to small business than the continued growth of the conglomerate corporation." *Id.*, at 59. Congress' clearly expressed concern with the conglomerate merger is in striking contrast to the preoccupation of lawyers and economists with tests that look only to the number and size distribution of firms in a single market, and is a challenge to this Commission and to the courts to devise tests more precisely adjusted to the special dangers to a competitive economy posed by the conglomerate merger.¹⁵

It must be stressed, however, that Congress, in seeking to bring "conglomerate" mergers within the reach of Section 7, did not thereby express the view that conglomerates are analytically a distinct merger class. Congress meant only that however a merger be characterized, its legal status under Section 7 is the same. As we have seen, even for purposes purely of description, the traditional three-

¹⁴ H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949); see *Brown Shoe Co. v. United States*, 370 U.S. 294, 317.

¹⁵ "Section 7 should be able to check a merger producing or enhancing the power of a giant firm without reference to the effect on concentration ratios in any particular market." Dirlam, *supra*, note 13, at 105. See Bicks, *Conglomerates and Diversification Under Section 7 of the Clayton Act*, 2 Antitrust Bull. 175, 178 (1956).

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fold classification—horizontal, vertical and conglomerate—is unsatisfactory without considerable further refinement. More important, these definitional distinctions import no legal distinctions under Section 7. The legal test of every merger, of whatever kind, is whether its effect may be substantially to lessen competition, or tend to create a monopoly, in any line of commerce in any section of the country.

Second. The Supreme Court has recently declared, "Subject to narrow qualifications, it is surely the case that competition is our fundamental national policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy." *United States v. Philadelphia National Bank*, 374 U.S. 321, 372. This policy informs all the federal antitrust laws, but some more explicitly than others. Section 7 predicates illegality specifically on the probability of a substantial anti-competitive effect; like the other sections of the Clayton Act, it singles out a particular class of business practices—corporate acquisitions—for especially strict antitrust scrutiny by the courts and the Commission. If the adverse effects on competition specified in Section 7 are proved, it will normally not be open to the respondent to show that redeeming social or economic benefits will flow from the acquisition.¹⁶ In the words of the Supreme Court:

"We are clear . . . that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or

¹⁶ The single exception is the failing-company defense (see *International Shoe Co. v. F.T.C.*, 280 U.S. 291, 299-303), which, although not mentioned in the statute, seems plainly to have been intended by Congress to be carried forward in the enforcement of the amended Section 7. See H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950). No contention has been made in this case that Clorox at the time of the acquisition was other than a profitable, healthy concern.

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economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid." *Philadelphia National Bank*, *supra*, at 371.

While a broad Rule of Reason may not be read into Section 7, it is clear that mergers are not to be judged according to a so-called *per se* standard. In every Section 7 proceeding, the burden is on the complainant to prove that the merger will create a reasonable probability of a substantial lessening of competition or tendency to create a monopoly. This burden is not met, in any case, by invocation of a talismanic *per se* rule by which to dispense with the need for adducing evidence of probable anti-competitive effect. Congress declared neither that all mergers, nor that mergers of a particular size or type, are *per se* unlawful. In every case the determination of illegality, if made, must rest upon specific facts. There may be cases in which a relatively simple test of illegality is appropriate, as the Supreme Court has shown in the *Philadelphia National Bank* case, but this is possible only where consideration of the nature and circumstances of the merger in question indicates that such a test will provide an adequate basis for ascertaining whether the statute has been violated; and even in such cases no *per se* rule or conclusive presumption of illegality is applied.¹⁷

¹⁷ The rule applied in the *Philadelphia National Bank* case was one of presumptive illegality. The Court did not suggest that the substantial change in the concentration ratio in the relevant market as a result of the merger created an irrebutable presumption that the merger would have the effects on competition specified in Section 7.

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Third. The concept of competition which underlies the amended Section 7 has no simple or obvious meaning, and was defined by Congress neither in the statute itself nor in the course of the deliberations that led to its enactment. But some of its elements, at least, are clear. It has been observed by the Supreme Court that the "dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."¹⁸ Congress' emphasis on concentration reflected its deep concern with what economists would call the problem of oligopoly (see S. Rep. No. 1775, 81st Cong., 2nd Sess. 5 (1950))—a problem that centers on undue or excessive market concentration. Indeed, the relationship between concentration (and related market-structure characteristics) and lessened competition is clearly, we think, at the core of Section 7. For this reason, the specific issues of this case must be placed in a larger frame of reference. Section 7 deals with the fundamentals of a free competitive economic system, and it is in the context of first principles that we must approach this case.¹⁹

In a market of, say, 100 sellers of roughly equal size, no seller need—or can—take into account his competitors' probable reactions in establishing his pricing or other busi-

¹⁸ *Brown Shoe Co.*, *supra*, at 315. See *Philadelphia National Bank*, *supra*, at 363; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 306-07 (1960).

¹⁹ The discussion of oligopoly and related economic concepts in the following pages is drawn from works generally accepted as authoritative in the field. See, e.g., Bain, *Barriers to New Competition* (1956); Bain, *Industrial Organization* (1959); Chamberlin, *The Theory of Monopolistic Competition* (7th ed. 1956); Fellner, *Competition Among the Few* (1949); Machlup, *The Economics of Sellers' Competition* (1952); *Business Concentration and Price Policy* (National Bureau of Econ. Research 1955); *Monopoly and Competition and Their Regulation* (Chamberlin ed. 1954). See also Kaysen & Turner, *Antitrust Policy* (1959). The Supreme Court in the *Philadelphia National Bank* case, by its repeated citation of economic analyses such as the above works, has clearly indicated the propriety of a reviewing tribunal's consideration of such analyses in reaching its decision in a Section 7 case.

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ness policies. No one seller in such a market is so powerful that he can retaliate effectively against a competitor who cuts prices or otherwise attempts to increase his market share; there are too many firms for deliberately interdependent pricing and other policies to be feasible (actual agreement, of course, would violate Section 1 of the Sherman Act); and no one seller's competitive behavior, however vigorous, is apt to endanger seriously the market share of any of his competitors, or even be apparent to them, since even if one seller increases his market share by 50%, the *pro rata* effect on each other seller's share will be only 1/200th. For these reasons, each seller is likely to establish his business policies in disregard of the actions of any individual competitor.

Conditions are very different in a market which has only, say, three sellers, each of equal size. If one cuts prices so as to increase his market share by 50% (i. e., to 50% of the market), each of his rivals will experience a 25% diminution in his respective market share. Unless they can operate profitably with their output thus curtailed, they must meet the price cut of their competitor. If there is active price cutting in such a market, the prices of all sellers will soon be forced down to the point at which they equal or barely exceed marginal cost—and no firm will be making a profit. Rather than incur price warfare that is bound to be mutually disadvantageous, each seller in a market of few sellers (an oligopolistic market) is likely tacitly to renounce price competition, and perhaps other forms of rivalry as well.²⁰

What makes such tacit renunciation of price competition feasible in the oligopolistic market, as it is not in the atomistic market, is the fact that the attempt of one seller to increase his market share is bound to have significant

²⁰ Bok, *supra*, note 18, at 310.

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repercussions upon the market shares of his competitors, who are compelled, in consequence, to retaliate immediately with a matching price cut. The price cutter "can't get away with it" for very long, and so he is better off refraining from systematic price cutting. The consequence of each firm's refraining from price competition is likely to be an unnaturally high price level in the market and a general deadening of competition. Price leadership, "conscious parallelism," excess capacity, emphasis on heavy advertising in lieu of technological innovation, and "administered prices," are some of the symptoms of oligopoly.

Of course, not all market structures are so easily classifiable as either atomistic or oligopolistic as those we have described. There is no ascertainable critical point, in terms of the number and size distribution of sellers in the market, at which behavior characteristic of the atomistic market ends and that characteristic of the oligopolistic begins, for everything depends on the psychology of business planners.²¹ Analysis of market structure does not tell us at exactly what point a particular firm, by reason of its own and its rivals' market shares, will decide it can no longer afford to ignore the probable reactions of its competitors in setting business policy.

Three further points about market concentration should be made. The first is that a market may be oligopolistic though a number of small firms exist alongside the few dominant firms. See *Philadelphia National Bank, supra*, at 367. But the small firms, in such circumstances, will not enjoy the same freedom of action as they would in an atomistic market, for they will not be competing on equal terms with the dominant firms. Where the disparity in market shares as between competitors is very large, the

²¹ "Oligopoly is . . . characterized by the state of mind of a seller vis à vis other sellers. . . ." Machlup, *op. cit. supra*, note 19, at 351.

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competitive disadvantage of the small firms is apparent. For example, if a firm with a market share of 2% doubles its production, a firm with a 33½% share of the same market will lose 2% of its sales. This may well be a sufficiently sharp decline to induce the large firm to meet the small firm's competitive foray, and, if the large firm reacts with great vigor, the result may be the destruction of its small rival. For should the large firm, by dint of vigorous competitive conduct, increase its market share from 33½% to 40%, the small firm's market share might shrink to nothing. In an oligopoly market, then, given the retaliatory power of companies having a strong market position,²² small firms tend to exist at the sufferance of their large rivals, and for that reason are likely to opt for peaceful coexistence—not vigorous competition—with those rivals. Small firms in such circumstances characteristically pursue the "quiet life," following the price leadership of the dominant firms in the market and otherwise conforming to the competitive norms established by those firms.

The second point is that oligopoly behavior does not depend upon there being any fixed size ratio among the leading firms. Nor need there be more than a single dominant firm. A market in which one firm enjoys, say, a share of 70%, with the balance divided among a number of other firms, will still exhibit the characteristics of oligopoly. The leader will have the kind of market power that compels his rivals to take his reactions into account in their business planning, and his disproportionate strength will tend to deter his small rivals from vigorous competitive activity.²³

²² See Comment, 68 Yale L. J. 1627, 1639, n. 57 (1959). Cf. Edwards, *Conglomerate Bigness As a Source of Power*, in *Business Concentration and Price Policy*, *op. cit. supra*, note 19, at 331, 335.

²³ Congress, indeed, appears to have been specifically concerned with the problem of single-firm dominance (short of outright monopoly) in amending Section 7. "The bill is intended to permit [legal] intervention

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The third point is that market concentration is a variable of market structure, not of market behavior. Undue concentration itself is not a form of anti-competitive conduct, as, for example, raising prices in the face of declining demand may be; but undue concentration increases the probability that behavior in the market will be non-competitive. In distinguishing market "structure" from "behavior," we do not mean to suggest that our concern is limited to a static, abstract model of market relationships. As will be seen shortly, market structure in a particular industry depends in significant respects upon the techniques of competition, and other dynamic factors, prevailing in that industry.

Although concentration may be the most important market structure variable and the one that was in the forefront of Congressional deliberations on the anti-merger statute, it is not the only such variable and it cannot be adequately understood apart from others. For present purposes, the most significant market structure variable after concentration is the condition of entry into the market by new competitors.²⁴ No firm will contemplate entry into a new market unless it feels reasonably sure of being able to obtain a satisfactory market share. If the firms in a concentrated market use their market power to maintain a very high price level, the attractiveness of entry is enhanced. For, in such circumstances, the new entrant, by selling somewhat below the prevailing price level in the market, will be able to obtain a foothold in the market yet

... when the effect of an acquisition may be a significant reduction in the vigor of competition. . . . Such an effect may arise in various ways: such as . . . [an] increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive." H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

²⁴ It is not the only other such variable, however. For example, competition may be affected by whether the number of buyers from the firms in the market is small (oligopsony).

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still operate well above his break-even point, so long as his costs are not substantially higher than those of the firms presently active in the market. Thus, the possibility of entry—potential competition—may exercise a restraining influence on oligopolists, who will be inclined to maintain a price level low enough to discourage entry, i.e., actual competition. For this reason the existence of barriers to entry into a concentrated market, which enable the established firms to raise prices above a low, entry-d discouraging level, is a factor that bears significantly on the existence of oligopoly conditions in the market.²⁵

At least three factors may retard entry. The first is the possession of cost advantages by the firms presently occupying the market vis-à-vis prospective entrants.²⁶ Such advantages may stem from, for example, control of patents, a scarcity of raw materials, or impeded access to channels of distribution (absolute cost advantages), or from scale of operation (advantages or economies of scale). In the case of absolute cost advantages, the prospective entrant can compete with the established firms only at a substantial disadvantage, and the chances that he will be able to obtain a reasonable position in the market are, in consequence, reduced. Even if the prevailing price level in the market is well above his cost level, he will be vulnerable to retaliation by established firms which have a lower cost level and hence a greater flexibility in pricing. As for advantages of scale, the prospective entrant, if he is to compete on equal terms with the established firms, must be prepared to operate on a sufficiently large scale to be able to obtain the same advantages of scale enjoyed by the established

²⁵ This is not to say, however, that the absence of substantial barriers will ensure effective competition in the market. See Bain, *Barriers to New Competition* 189 (1956).

²⁶ See Bain, *Industrial Organization* 249-51 (1959); Bain, *Conditions of Entry and the Emergence of Monopoly*, in *Monopoly and Competition and Their Regulation* 215, 226-36 (Chamberlin ed. 1954).

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firms. If the scale of optimum efficiency in the industry is substantial, a heavy initial investment may be required. To justify such an investment, the entrant must be in a position to obtain a large market share within a reasonable period of time. In these circumstances, the entrant is not only being made to play the competitive game for high stakes, but, by being forced to enter on a large scale, he is virtually ensuring a swift competitive response by the established firms. They might tolerate the obtaining of a small foothold by a new entrant, but they can hardly sit by while a large share of the market is absorbed by the newcomer.

Another, and perhaps more important, entry-retarding factor is "product differentiation."²⁷ The term refers to consumer preferences as between very similar, close-substitute products or brands. Such preferences need not, and frequently do not, rest on real or substantial differences in terms of quality or usefulness. By reason of distinctive packaging, the firm's long history, mass advertising and sales promotions, or other factors, a firm may succeed in establishing such a definite preference for its brand that the consumer will pay a premium to obtain it, although it is functionally identical to competing brands. Such brand allegiance, which the prospective entrant, marketing a new brand, will not, of course, command, may be the cumulative result of the expenditure of many millions of dollars over a period of many years to promote the brand, and

²⁷ "[T]he most important barrier to entry discovered by detailed study is probably product differentiation." Bain, *Barriers to New Competition* 216 (1956). Some commentators, see, e.g., Kayser and Turner, *Antitrust Policy* 74 (1959), follow Chamberlin in classifying product differentiation as a distinct market structure variable, rather than subsume it under condition of entry. Since, as will appear, condition of entry as we use that term is relevant not only to new entry, but equally to the competitive vigor of the existing firms in the market, it is of no practical significance whether product differentiation be deemed an independent factor or an aspect of condition of entry.

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may, in consequence, be very difficult to counteract even if the entrant makes a very substantial initial investment to promote his own brand.²⁸ As a result, in an industry in which product differentiation is an important factor, not only may the new entrant find it especially difficult to pry customers loose from the established firms, but the higher price obtainable for a brand that has been successfully differentiated in the public mind from competing brands may impart a flexibility in pricing, akin to that imparted by cost advantages, which the newcomer may not be able to achieve for many years.

The third entry-retarding factor is the financial size or strength of the established firms in comparison to that of prospective entrants. Plainly, entry is more effectively deterred by the prospect of an established firm which can well afford to meet a competitive challenge, than by the prospect of a firm small compared to the entrant (though large in its market) or in poor financial condition.

The three entry-retarding factors obviously interact, most notably perhaps in industries in which the dominant firms have succeeded in differentiating their products through mass advertising and sales promotions. As noted earlier (see JA 399a), advertising in the mass media

²⁸ See Bain, *Industrial Organization* 240, 250, 320 (1959); Bok, *supra* note 18, at 239. The Supreme Court has given explicit recognition to the role, in the repulsion of new competition, of heavy expenditures for product differentiation:

"The record is full of the close relationship between . . . large expenditures for national advertising of cigarettes and resulting volumes of sales. . . . Such advertising is not here criticized as a business expense. Such advertising may benefit indirectly the entire industry, including the competitors of the advertisers. Such tremendous advertising, however, is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising." *American Tobacco Co. v. United States*, 328 U.S. 781, 797.

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may not be optimally efficient except on the part of a firm which operates on a national scale; and, obviously, advertising on a national scale demands considerable financial strength. Moreover, the effectiveness of advertising and sales promotions would appear to increase, at least up to a certain point, in direct proportion to their volume. A seller with an advertising and sales promotion budget twice that of his principal competitor not only may be able to recoup his additional selling costs in the premium price that he is able to charge for his brand; in addition, his more intensive advertising and promotional efforts are very likely to increase his market share at the expense of his rivals, because the more advertising and promoting a firm does, the more intensively is the public exposed to and persuaded to buy the firm's brand. Thus, financial strength and large absolute size may be indispensable attributes in enabling a substantial market share to be acquired and maintained in industries characterized by product differentiation through advertising and promotions.²⁹ At the same time, given the extent to which effectiveness in the utilization of advertising and other promotional activities seems to be a function of size and strength, the scale necessary for a firm to operate at optimum efficiency in the market may become very large indeed. See Bain, *Barriers to New Competition* 138 (1956).

It is important to note that the factors making for high entry barriers also make for domination of small competitors by large, and so tend to eliminate actual as well as potential competition. If the large firm enjoys substantial competitive advantages by virtue of product differentiation, cost advantages or financial strength, any attempt by a

²⁹ See Bain, *Industrial Organization* 172-73 (1959); Bain, *Advantages of the Large Firm: Production, Distribution, and Sales Promotion*, 20 *J. of Marketing* 336, 341 (1956).

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small firm to expand its market share at the expense of the large firm is unlikely to succeed.³⁰ By the same token, should the large firm desire to expand its market share, the small firm, lacking comparable financial reserves, pricing flexibility, or a reservoir of accumulated consumer preference, is apt to be the first to lose ground. The power to repel or discourage new competitors, then, is the power to control or discipline existing competitors, to make them reluctant to engage in conduct, such as price cutting, which might provoke retaliatory action on the part of the dominant firms. In sum, high entry barriers, like excessive concentration, impair effective competition.

Fourth. The concept of competition upon which Section 7 rests has aspects which transcend the narrowly economic. "Other considerations [besides the danger to the economy posed by unchecked corporate acquisitions] cited in support of the bill [to amend Section 7] were the desirability of retaining 'local control' over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose." *Brown Shoe Co., supra*, at 315-16.³¹ One commentator has suggested that the legislative history of Section 7 invites "reliance upon a structural

³⁰ "In many cases . . . the most important benefit [from increased firm size] is the ability to support far larger budgets for advertising and promotion than a small firm could feasibly assume. Thus, by growing larger, the producer of a retail commodity can increase its capacity to establish consumer preferences for its product to an extent that cannot easily be matched by its smaller rivals. In this way, the relative strength of the largest firm is enhanced, since efforts by smaller concerns to expand their share of the market will tend to be somewhat blunted by the popularity of the more highly advertised product." Bok, *supra* note 18, at 276. See Bain, *Industrial Organization* 174 (1959).

³¹ The legislative history is reviewed by Bok, *supra* note 18, at 234-37, 247.

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theory of competition which stresses the advantages of large numbers of small-sized firms.”³²

We cannot shut out the broad policy considerations which figured so prominently in the deliberations leading to Section 7, however difficult they may be to translate into precise legal criteria. To disregard them, moreover, would be to close our minds to a persistent theme in federal trade regulation. “Throughout the history of these statutes [the federal antitrust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.” *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).³³ On the other hand, there is no warrant in the language or history of Section 7 for subordinating the protection of competition to the protection of small-business competitors.³⁴

If the effect of a merger is to place a number of small firms at a severe competitive disadvantage, and the merger cannot be shown to enhance the general competitive vigor of the market, it may be appropriate, in implementing Section 7, to note Congress’ patent concern with the preservation, to the extent compatible with social and economic progress, of the fundamental benefits of a small-business, decentralized economy. The interest in fostering equality of opportunity for small business and in promoting the diffusion of economic power, although it may not be identical to the economists’ notion of competition, was unques-

³² Bok, *supra* note 18, at 247. Professor Bok, however, criticizes such a test as unworkable. *Id.*, at 248.

³³ See Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* 227 (1954); Dirlam & Stelzer, *The DuPont-General Motors Decision: In the Antitrust Grain*, 58 Col. L. Rev. 24, 41 (1958).

³⁴ See *Philadelphia National Bank*, *supra*, at 367, n. 43; *Brown Shoe Co.*, *supra*, at 320; *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 588, 592 (S.D.N.Y. 1958).

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tionably intended by Congress to be relevant in any scheme for the enforcement of Section 7.³⁵

Fifth. Section 7 embodies a *preventive* antitrust philosophy; Congress wanted the enforcement agencies to be able to arrest the anti-competitive effects of market power in their incipency. A corollary of Section 7's prophylactic function is that the requirements of proving a violation are less strict than they would be under the Sherman Act. A further corollary is that evidence of market behavior, as opposed to evidence of market structure, is not a necessary ingredient of the *prima facie* case. If the enforcement of Section 7 against a particular merger were impossible until actual non-competitive practices had been discovered in the market affected by the merger, all opportunity to attack those practices at their root would be lost. Economists teach, and Congress, in enacting the amended Section 7, postulated, that market behavior follows market structure; hence, proof that a merger has created or aggravated a market structure conducive (in a practical, not theoretical or abstract, sense) to practices that substantially lessen competition, or tend to monopoly, is sufficient under the statute. Cf. *Brown Shoe Co.*, *supra*, at 322.

The preventive philosophy reflected in Section 7 has significance not only in fixing the requirements of a *prima facie* case in a Section 7 proceeding, but in defining the standards of relevancy and materiality governing such a proceeding. The Supreme Court has been quite explicit as to the latter:

³⁵ Compare Adelman, *supra* note 12, at 236; Dewey, *Mergers and Cartels; Some Reservations About Policy*, 51 Am. Econ. Rev. 255, 261-62 (Papers and Proceedings, 1961). "[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." *Brown Shoe Co.*, *supra*, at 344.

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"... [T]he ultimate question under § 7 [is] whether the effect of the merger 'may be substantially to lessen competition' in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.' Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." *Philadelphia National Bank, supra*, at 362 (citations omitted). See *Brown Shoe Co., supra*, at 341 & n. 68; *Standard Oil Co. v. United States*, 337 U.S. 293, 313.

The Court's emphasis appears to be twofold. On the one hand, a statute aimed at arresting practices in their incipiency can deal only with broad probabilities. The very nature of such a statute makes a quest for certainty delusive.³⁶ This is especially true in an area in which lawyers, not trained in economic analysis, must nonetheless grapple with what must often appear to be an unintelligible mass

³⁶ "A preventive antitrust policy . . . should be directed at activities which on their face have a general and important tendency to reduce competition. . . ." Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176, 177 (1955). Cf. *Brown Shoe Co., supra*, at 323 (Congress' "concern was with probabilities, not certainties").

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of complex economic materials. Not surprisingly, the less sophisticated in economic matters a lawyer is, the more "thorough" a job of economic inquiry he is likely to believe necessary.³⁷ The emergence of a class of business practices as to which, under the Sherman Act, a substantial anti-competitive effect is conclusively presumed (so-called *per se* offenses) testifies to the exigent need of simplifying the economic issues in antitrust litigation. Even where a *per se* rule is inappropriate, some limitation of the scope of economic inquiry will almost always be necessary and proper, for "the demand for full investigation of the consequences of a market situation or a course of business conduct is a demand for nonenforcement of the antitrust laws." Mason, *Market Power and Business Conduct: Some Comments*, 46 Am. Econ. Rev. 471, 478 (Papers and Proceedings, 1956). In a Section 7 proceeding, an inquiry bent on obtaining and digesting all data arguably relevant in making "some ultimate reckoning of social or economic debits and credits" of the merger (*Philadelphia National Bank*, *supra*, at 371), but not genuinely probative in making "an appraisal of the immediate impact of the merger upon competition . . . [and] a prediction of its impact upon competitive conditions in the future" (*id.*, at 362), is inevitably self-defeating, as the Commission's experience in this class of cases has amply demonstrated.

Furthermore, the danger is acute that if proceedings under Section 7 are allowed to become top-heavy with masses of economic and business data which are not strictly probative, the statute will become useless as an enforcement tool. In a merger proceeding, relief short of divestiture is rarely adequate. But divestiture is not a practical

³⁷ "[E]rrors in logic and inference will increase when large amounts of complex data must be considered in a conceptual framework that is but partially understood." Bok, *supra* note 18, at 295.

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remedy unless it is accomplished within a reasonable time after the consummation of the merger. If too much time elapses, the property, good will, management, customers, business opportunities, and other assets and attributes of the acquired and acquiring firms tend to become irremediably commingled, and the acquired firm may lose all vestiges of independence. It may be impossible to reconstitute the acquired firm as a going concern; the patient, as it were, will be too far gone for medicine, or even radical surgery, to do him any good.

Other interests press for the simplifying and expediting of Section 7 proceedings. One is the interest in business stability and progressiveness. While an action under Section 7 is pending, the business decisions of the merged firm may be characterized by hesitancy and indecisiveness, due to uncertainty about the future of the firm. So also, perfectly lawful mergers may be deterred by the prospect of protracted legal proceedings whose outcome cannot reasonably be predicted. Finally, the effectiveness of Section 7 to check, where necessary in the interest of protecting competition, the very large annual wave of mergers⁵⁸ will be impaired if the limited staff and budget of this Commission (and of the Antitrust Division of the Department of Justice) that can be devoted to the enforcement of Section 7 are allowed to be frittered away in unduly complex and protracted proceedings.

That effective relief in a Section 7 proceeding becomes increasingly difficult, to the point of impossibility, over time, coupled with the other considerations we have men-

⁵⁸ In 1959-61, an average of 650 firms disappeared annually through mergers—more than at any time since 1926-30, the crest of the last great merger movement. These figures are rough estimates, are confined to manufacturing and mining firms, and probably underestimate the actual number of mergers even among those firms. See *Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms*, *op. cit. supra* note 13, at 266. This Commission counted, for example, 1260 industrial mergers in 1962. F.T.C. News Release, Feb. 8, 1963.

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tioned, argues in favor of sharply narrowing, wherever possible, the scope of permissible legal inquiry. Clear and relatively simple rules, and the rigorous exclusion of evidence which bears only remotely upon the central concerns of the statute, are essential if Section 7 is not to become a judicial and administrative nullity.

Specifically, we think that the admission of post-acquisition data is proper only in the unusual case in which the structure of the market has changed radically since the merger—for example, where the market share of the merged firm has dwindled to insignificance—or in the perhaps still more unusual case in which the adverse effects of the merger on competition have already become manifest in the behavior of the firms in the market. See *Reynolds Metals Co. v. F.T.C.*, 309 F.2d 223 (D.C. Cir. 1962). If post-acquisition data are to be allowed any broader role in Section 7 proceedings, a respondent, so long as the merger is the subject of an investigation or proceeding, may deliberately refrain from anti-competitive conduct—may sheathe, as it were, the market power conferred by the merger—and build, instead, a record of good behavior to be used in rebuttal in the proceeding. One consequence of a receptive attitude toward post-acquisition evidence on the part of the tribunals deciding Section 7 cases is that there will be frequent remands for further such evidence, as the instant case illustrates, until eventually the proceeding may become so protracted as to preclude effective relief, or may terminate in the respondent's favor only because his good-conduct evidence has been considered persuasive. At that point, the respondent is free to take the wraps off the market power conferred by the merger.

More important, given the nature of the concerns that moved Congress to amend Section 7, post-acquisition evidence will rarely have substantial probative value even if

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the respondent's post-acquisition conduct is not influenced by the threat of legal action. Congress postulated that certain kinds of market structure would ordinarily lead to non-competitive company behavior. If a market structure conducive to non-competitive practices or adverse competitive effects is shown to have been created or aggravated by a merger, it is surely immaterial that specific behavioral manifestations have not yet appeared. In many cases, the converse will also hold true. The fact that non-competitive practices have persisted or even increased in the market since the merger may reveal little about the merger's effects. The behavior of firms is a complex matter; it may be impossible to separate out the various causal factors so precisely as to be able to attribute non-competitive behavior to a particular merger. The same strictures apply to evidence of changes in market *structure* that have occurred since a merger. The full significance of such changes may not become apparent until long after they occur, and their relationship to a particular merger is likely to be obscure.

At all events, the ineffectuality of a wait-and-see policy on the part of the agencies charged with the enforcement of Section 7 should be obvious. If the agencies postpone the commencement or completion of an action challenging a merger in order to see what trends or results will stem from it, they thereby disable themselves from obtaining or granting effective relief. It bears repeating that an order divesting corporate assets that were acquired a long time before the issuance of the order rarely advances the policies of Section 7.

C. THE EFFECTS OF THE INSTANT MERGER ON COMPETITION

With the foregoing general principles in mind, we now address ourselves to the ultimate question in this, as in

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every Section 7, case: whether the effect of the particular merger "may be substantially to lessen competition, or to tend to create a monopoly," "in any line of commerce in any section of the country."

The relevant line of commerce (product market) in this case is alleged to be household liquid bleach (5¼% sodium hypochlorite solution). No contention is made that industrial bleach should be included, and the contention, urged below by respondent, that dry or powdered bleach is sufficiently interchangeable with liquid bleach to be part of the same line of commerce, has not been pursued on appeal. It is clear, at all events, that the examiner's exclusion of powdered bleach from the relevant line of commerce was correct. The evidence shows that liquid and dry bleaches are used for different purposes: dry bleaches are in the light-duty category; liquid bleaches are in the heavy-duty category. Dry bleaches are approximately twice as expensive to use as liquid bleaches and their primary utility is in bleaching fine fabrics that do not respond well to stronger bleaches. To the consumer, liquid and dry bleach are economically and functionally distinct products that are poor substitutes for each other. See *Reynolds Metals Co. v. F.T.C.*, 309 F.2d 223, 226-27 (D.C. Cir. 1962); *Crown Zellerbach Corp. v. F.T.C.*, 296 F.2d 800, 811 (9th Cir. 1961). In any event, at the time of the merger dry bleach accounted for only about 10% of total household bleach sales, so that even if it were included as part of the relevant product market, the market shares of Clorox and its competitors would not be changed substantially.

The relevant geographical market in a Section 7 case ("section of the country") is, in the words of the Supreme Court, "where . . . the effect of the merger on competition will be direct and immediate." *Philadelphia National Bank, supra*, at 357. The complaint charges that the

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effects of the merger on competition will be felt in the national market for household liquid bleach and in a number of regional submarkets as well. Since high shipping costs impose definite territorial limitations upon the distribution of household liquid bleach, and since Clorox is the sole producer for the national market, the appropriateness of appraising the merger in terms of its alleged impact upon the national market is somewhat questionable. The effects of Procter's acquisition of Clorox will be felt differently in the different regions of the country, according to the market position occupied by Clorox vis-à-vis its competitors in each region. Cf. *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D. N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958). No uniform national impact can be forecast.

Despite the fact that the proper sections of the country in this proceeding are a series of distinct regional markets, no attempt has been made to demarcate these markets, and it is probably not a feasible undertaking.³⁹ In such circumstances, it is appropriate to use aggregate national figures as approximations of conditions obtaining in the several regional markets. Cf. *Brown Shoe Co.*, *supra*, at 342-43. If anything, the use of such figures favors respondent. Even if the regional sales figures in the Nielsen Index cannot be accepted as accurate market share percentages, they strongly suggest that in many of the geographical markets for liquid bleach Clorox's market share must be

³⁹ The regional breakdowns given in the A. C. Nielsen Food Index (see p. 7 above) represent standardized zones which Nielsen uses for all grocery products, and are not drawn so as to reflect meaningful geographical markets for the household liquid bleach industry. In rejecting these zones as geographical markets for present purposes, we do not mean to suggest that extremely rigorous standards of proof in this area are appropriate or allowable. The Supreme Court has cautioned that certainty in the calculation of the relevant market cannot, and need not, be achieved. *Philadelphia National Bank*, *supra*, at 361.

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considerably higher than its national average, in places approaching monopoly proportions.

Having established the relevant market, we are prepared to analyze its structure, disregarding, for the moment, the impact of the merger upon it. Manifestly, the household liquid bleach industry is highly concentrated and oligopolistic. A small number of firms (6) account for an overwhelming proportion of the industry's sales (80%), and what is left is divided among firms which, absolutely and relatively, are very small. The concentration ratio, in other words, is that characteristic of oligopoly.⁴⁰ Among the market leaders, a single firm, Clorox, is dominant.⁴¹ It enjoys almost 50% of the total sales of the industry. Moreover, as the only national seller in an industry strongly characterized by product differentiation through advertising, Clorox enjoys a decisive competitive advantage, and has succeeded in creating a definite consumer preference for the Clorox brand, enabling it consistently to be priced at or above the level of any competing brand. In point of either market share or financial strength, no firm except Purex can be regarded as a significant competitive factor in the industry, and Purex does not compete with Clorox at all in about one-half of the nation. Indeed, in several areas of the country, Clorox faces no competition whatever from the principal firms, such as they are, of the industry (see JA 397a).

⁴⁰ Professor Bain would probably categorize the household liquid bleach industry as "highly concentrated." See Industrial Organization 127 (1959). Professors Kaysen and Turner would categorize it as a "Type One structural oligopoly," wherein "the first eight firms have at least 50 percent of total market sales and the first twenty firms have at least 75 percent of total market sales." Antitrust Policy 27 (1959). In the *Philadelphia National Bank* case, after the merger the leading firm in the relevant market had a 30-35% share, and the top 4 firms combined, roughly 78%.

⁴¹ "[W]hen one firm has forty or fifty per cent or more [of the market] . . . competition will seldom plague the industry." Stigler, *supra* note 36, at 181.

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The factors which make for dominance by Clorox of its rivals also make for formidable barriers to new entry. To be fully efficient, a new entrant into the bleach industry would have to advertise and operate from the outset on at least a broad regional scale,⁴² and consequently incur a very heavy initial investment for advertising. To undertake to operate on such a large scale profitably, a prospective entrant must, as we noted earlier, be able to obtain a substantial market share within a reasonable period of time. But if a firm did succeed in acquiring a significant share of one of the regional liquid bleach markets, it would almost certainly provoke a competitive response from Clorox, which could not afford to remain passive in the face of a significant encroachment upon its market position. In the resulting competitive struggle, Clorox, by reason of the substantial, accumulated consumer preference for the Clorox brand, would have a great advantage.

There is evidence in this case that before a new brand of liquid bleach can be safely launched, it must be test-marketed locally. Since Clorox is active in every part of the country, it is in a position, by responding promptly to every such test, to prevent a prospective entrant from acquiring the market data it needs in order even to begin to compete. Indeed, this is what Purex claims Clorox did in Erie, Pennsylvania—responded so promptly and vigorously to Purex's competitive sortie that Purex was unable to complete the test-marketing of its new container (see JA 400a). This incident illustrates, moreover, the two-edged quality of Clorox's dominant position. Not only is it a significant impediment to new entry; it is also an effective barrier to the growth or expansion of Clorox's exist-

⁴² Cf. Bain, *Advantages of the Large Firm: Production, Distribution, and Sales Promotion*, *supra* note 29, at 344.

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ing rivals in the bleach industry, and thus an inhibitor of vigorous competitive activity.

Clorox's dominant position in the liquid bleach industry is dramatically shown by the fact that Procter, the nation's largest advertiser and perhaps leading manufacturer of household products comparable to liquid bleach, preferred to pay a very large premium for the good will of Clorox (the \$17,700,000. difference between the purchase price of Clorox, \$30,300,000, and the valuation of Clorox's assets, \$12,600,000, suggests the size of this premium), rather than enter the industry on its own. Few firms—certainly none of the firms now active in the liquid bleach industry, with the possible exception of Purex—are in a position to make the investment evidently required to become a fully effective competitor in the liquid bleach industry. Perhaps entry or slight market expansion on the part of very small, neighborhood bleach producers is possible notwithstanding Clorox's dominant position. But the conclusion seems inescapable that at the time of the merger, the industry was concentrated, and barricaded to new entry, to a degree inconsistent with effectively competitive conditions.

What are the consequences for competition if, in an industry such as we have described, a firm such as Procter is substituted for the industry's dominant firm? We find that there are significant areas in which absorption by Procter is likely to affect Clorox's competitive position.

In the first place, the record shows that in the liquid bleach industry the merger of a relatively small, single-product firm with a very large, multi-product firm enables substantial cost savings and other advantages in advertising and sales promotion, especially in television advertising.

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The maximum annual volume discounts available to the largest advertisers amount to 25-30% for network television advertising and somewhat smaller but still substantial percentages for magazine, newspaper, and radio advertising. In addition, the discount rates available for local "spot" television advertising favor the large advertiser. In 1957, Clorox spent \$1,150,000 on television advertising of all kinds on all stations. While complete discount rates are not included in the record, it is virtually certain that an expenditure of this size spread over all networks and stations did not entitle Clorox to discounts of any substance. For example, a \$3,000,000 expenditure on NBC or CBS night time is required for the maximum discount. The record shows that Purex, in time bought in behalf of its complete line of products, received a 6% discount on an expenditure of \$1,400,000 on one network, and a 15% discount on an expenditure of \$2,400,000 on another. This was possible because Purex, unlike Clorox, is a multi-product firm, and because an advertiser can combine all of his advertising for all of his products to obtain the volume discount, which is then applied to the advertising for each brand. It is conceded that Procter is entitled to, and receives, the maximum volume discounts available in television advertising and, no doubt, in other media as well. With Clorox now a part of the Procter line, for the same amount of money Clorox spent on network television advertising prior to the merger, at least 33⅓% more network television advertising can now be obtained.

Analogous benefits are obtainable in the other advertising media. The record discloses that maximum volume discounts of between 12% and 17% are available to advertisers in the leading women's or family magazines. An annual expenditure of \$1,000,000 or more may be necessary to earn the maximum in a particular magazine. Prior

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to the acquisition, Clorox received no discounts for magazine advertising. Purex, the record shows, received a small discount in one magazine.

The scale advantages of a large, multi-product firm in advertising are not limited to volume discounts. According to uncontradicted evidence of record, a commercial announcement during a television program is substantially more effective in promoting a product than one during the between-program station break. Not only is the viewer apt to be less attentive during the station break—he may be switching stations, or he may leave the room momentarily—but a brand becomes better known to the consumer by being associated with a program which the consumer watches. Unless Clorox had been willing to put a disproportionate share of its advertising budget into a single venture, it could not, prior to the acquisition, have afforded to buy an entire network television program. Cf. *United States v. Lever Bros. Co.*, 216 F. Supp. 887, 899 (S.D.N.Y. 1963). Procter, however, can and does buy the sponsorship of such programs in behalf of several of its products, and this means that if Procter includes Clorox among the products advertised on such a program, Clorox can realize the advantages of network program advertising at a fraction of the cost that would have been required prior to the merger. Moreover, even if Clorox could have purchased sponsorship of a program prior to the merger, the same investment, if used now to buy one-third of three shows sponsored by Procter, will result in broadened consumer exposure to the Clorox brand, thereby increasing the effectiveness of the investment.

Another advantage in network program advertising that can be derived from the association of Clorox with Procter arises from the ability of a multi-product national advertiser to run commercials for different products in different

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sections of the country during a single commercial break. If Procter decides that Clorox needs advertising support in some area where Clorox faces particularly intense competition, it can place a Clorox commercial in that area, and that area only, while the remainder of the country is watching a commercial for one or more of Procter's other products. Clorox thereby gains the advantage of association with network television while actually limiting its advertising expenditures to selected regional markets.

Similar advantages are obtainable by joint promotions, and by joint advertising in the other media. Procter can incorporate promotions for Clorox on the same in-store display cards as are used for other Procter products and thus receive point-of-sale promotion for several products at the cost of printing, distributing and installing one set of cards. Similarly, premium and special-offer coupons for Clorox can be mailed in the same envelope as those for other Procter products. In this way Clorox reaps the advantage of this type of promotion without having to pay full processing and mailing costs or make the initial investment necessary to launch this promotional method. The record shows that Procter has frequently engaged in combined-product displays and promotions of this sort.

Joint newspaper or magazine advertising of Procter products, including Clorox, also offers the possibility of considerable cost advantages.

A related point is that while prior to the merger Clorox distributed bleach to retailers by means of a network of independent brokers, Procter has a direct sales force for its products, and, were Procter to distribute Clorox bleach through this sales force, distinct promotional advantages would probably result. Independent brokers handle the products of many manufacturers and frequently carry competing brands; they have no particular interest in push-

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ing one brand rather than another. Procter's sales force deals only in Procter products and spends considerable effort assuring these products adequate and prominent shelf space and special displays. In light of the critical role played by shelf space in liquid-bleach competition, use of a direct sales force—a device that may be fully efficient only for a multi-product firm—would in all likelihood substantially increase Clorox's already great market power.

The acquisition also has consequences for the bargaining position of Clorox in its dealings with retailers of liquid bleach. That Procter is the leading producer of a number of products marketed through grocery stores may enable it to induce retailers to give favored treatment to Clorox in the crucial fight for shelf space or otherwise concede especially advantageous terms involving the retail selling of Clorox bleach. We need not go so far as to find that leverage of the kind that supports tie-in and full-line forcing arrangements may be Procter's to wield in behalf of Clorox. Given Procter's position as a well-established producer of a broad range of common grocery items—many of them "must" items (see JA 456a)—it would seem likely that Procter can obtain from retailers, as a matter not of coercion but of convenience or expediency, certain advantages in the display or marketing of its products which are not available to a single-product producer, such as the pre-merger Clorox. Cf. Machlup, *The Political Economy of Monopoly* 111-12 (1952).

Another material consequence of the merger is the advent, in the liquid-bleach industry, of a firm with a breadth of experience and degree of financial strength beyond anything possessed by the existing members of the industry. We have already indicated the importance of absolute size in effective advertising; Procter's size, whether measured by sales or assets, is many times greater than that of

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the largest firm operating in the industry prior to the merger. Furthermore, there is testimony in the record that sales promotions are considered in the main too expensive for a single-product firm in the relatively small-scale bleach industry; thus, at the time of the merger, Clorox was engaged in virtually no sales-promotion activities. Procter, a firm that in 1957 incurred sales-promotion expenses in an amount greater than Clorox's total sales, is in an obvious position to utilize the sales-promotion technique on a wide scale in behalf of Clorox.

Financial ability, moreover, may play a substantial competitive role in an industry such as liquid bleach quite apart from advertising and sales promotions. The record shows that one way in which a producer may obtain increased shelf space is by offering the merchant a special price, thus enabling the merchant to obtain a higher resale profit margin. To be able to do this frequently and effectively requires the kind of pricing flexibility available only to a firm with ample reserves. So also, it is a fact that consumer preferences for particular liquid bleach brands, even for Clorox, are not invulnerable to competitive inroads; the Erie, Pennsylvania, incident (see JA 400a) demonstrates the prevalence of local price cutting. Even local price cutting, however, cannot long be maintained by a firm short on reserves. In a price fight to the finish, Procter, whose aggregate scale of operations and fiscal resources dwarf the entire liquid bleach industry, can hardly be bested.

Consideration must also be given to the danger that a multi-product firm such as Procter, operating in a market otherwise consisting of single-product firms, may engage in systematic underpricing having most unfair and destructive effects even though the firm is wholly innocent of any predatory intent. "[T]otal profit may be maximized

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[in a multi-product firm] . . . by selling some lines below accounting costs." ⁴³

"A concern that produces many products and operates across many markets need not regard a particular market as a separate unit for determining business policy and need not attempt to maximize its profits in the sale of each of its products, as has been presupposed in our traditional scheme. It may classify its products into such categories as money-making items, convenience goods, and loss leaders, and may follow different policies in selling the different classes." Edwards, *Conglomerate Bigness As a Source of Power*, in *Business Concentration and Price Policy* 331, 332 (National Bureau of Econ. Research ed. 1955).

Thus, the greater flexibility in pricing enjoyed by the multi-product firm may lead, without predatory motive or purpose, to below cost selling of a particular product which is in competition with a small firm's single product.

In addition to the concrete competitive advantages in liquid bleach competition which stem from Procter's substitution for Clorox in the liquid bleach industry, some account must be taken of certain intangibles of reputation which Procter unquestionably possesses. Whether or not Procter is in fact a well-managed and aggressive competitor, a question on which the record in this case permits no expression of opinion, the record does disclose that Procter is so regarded by the firms in the liquid bleach industry. To them, Procter is a more feared competitor than was the pre-merger Clorox. Since, as was noted earlier, market

⁴³ Thorp & Crowder, *The Structure of Industry* 667 (T.N.E.C. Monograph No. 27, 1941). "[D]iversification may so cloud a concern's cost structure as to result in the shelter of inefficiently made products; a given product may be subsidized without the knowledge of its producer." Hale, *supra*, note 8, at 361.

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behavior is determined by the state of mind of the firms in the market, Procter's history of success, its general size and its prowess, which loom large in the eyes of the small liquid bleach firms, must for that reason alone be reckoned significant competitive factors.

Enough has been said to establish that the merger of Procter and Clorox adversely affects the market structure of the liquid bleach industry. While the merger has no immediate impact on the number or size distribution of firms in the market, it does have an immediate impact upon another important variable of market structure—the condition of new entry. Procter, by increasing the Clorox advertising budget, by engaging in sales promotions far beyond the capacity of Clorox's rivals, and by obtaining for Clorox the advertising savings to which Procter, as a large national advertiser, is entitled, is in a position to entrench still further the already settled consumer preference for the Clorox brand, and thereby make new entry even more forbidding than it was prior to the merger. In addition, because a multi-product firm of large size enjoys, as has been seen, very substantial competitive advantages in an industry strongly marked by product differentiation through mass advertising, sales promotions, shelf display and related merchandising methods, the prospects become increasingly remote, given the substitution of Procter for Clorox in the liquid bleach industry, that small or medium-sized firms will be minded to enter the industry. The scale of optimally efficient operation in the industry has been so increased, by reason of Procter's advent, that only very large firms—firms on the scale of Procter itself—can reasonably be expected to be able to compete on roughly equal terms in the industry.

In short, the barriers to entry, already very high, have been markedly heightened by the merger—to the point at

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which few firms indeed would have the temerity or resources to attempt to surmount them. And, as has been observed, a heightening of entry barriers concomitantly enhances the power of market leaders to dominate their small rivals, and so smother effective competition. Given Procter's materially greater strength, compared to Clorox, as a liquid bleach competitor, vigorous competition by the small firms in the industry would appear still more effectively and substantially inhibited than prior to the merger.

Our finding that, as a result of this merger, the market structure of the liquid bleach industry is significantly less conducive to competition than was the case prior to the merger, is not in any way dependent upon the actual course of Procter's post-merger conduct. We need not attempt to ascertain or predict whether, and to what extent, Procter has taken or will take active steps to obtain for Clorox the potential scale or other advantages accruing from the merger. As has been pointed out, the conditions which retard competition in an industry are to an important degree psychological. They stem from competitors' appraisal of each other's intentions, rather than from the intentions—or the actions taken upon them—themselves. The appropriate standpoint for appraising the impact of this merger is, then, that of Clorox's rivals and of the firms which might contemplate entering the liquid bleach industry. To such firms, it is probably a matter of relative indifference, in setting business policy, how actively a Procter-owned Clorox pursues its opportunities for aggressive, market-dominating conduct. The firm confined by the high costs of shipping liquid bleach, and the high costs of national or regional advertising, within a geographically small area, cannot ignore the ability of a firm of Procter's size and experience to drive it out of business (not necessarily deliberately) by a sustained local campaign of adver-

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tising, sales promotions and other efforts. See Blair, *The Conglomerate Merger in Economics and Law*, 46 Geo. L.J. 672, 688-89 (1958). A small or medium-sized firm contemplating entry cannot ignore the fact that Procter is a billion-dollar corporation whose marketing experience extends far beyond the limited horizons of the liquid bleach industry and whose aggregate operations are several times greater than those of all the firms in the industry combined. Even a large firm contemplating entry into such an industry must find itself loath to challenge a brand as well-established as Clorox bleach, when that brand is backed by the powerful marketing capacities of a firm such as Procter.

If we consider, in other words, not what Procter will in fact do to exploit the power conferred on it by the merger, or has done, but what it can and is reasonably likely to do in the event of a challenge to its dominant market position in the liquid bleach industry, we are constrained to conclude that the merger has increased the power of Clorox, by dominating its competitors and discouraging new entry, to foreclose effective competition in the industry.

D. THE SUBSTANTIALITY OF THE INSTANT MERGER'S ANTI-COMPETITIVE EFFECTS

In finding that the merger of Procter and Clorox has an undesirable effect, from the standpoint of maintaining competition, on the market structure of the liquid bleach industry, we have not determined the legality *vel non* of the merger under Section 7. The statutory test, whether the effect of the merger may be *substantially* to lessen competition, or tend to create a monopoly, has yet to be applied to the facts as found.

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The language of Section 7 refutes any notion that every merger whose probable effect on competition is adverse is, for that reason, unlawful. Congress plainly meant to exclude from the proscription of Section 7 mergers having a negligible, abstract, or merely theoretical impact upon the structure of the relevant market. The impact must be significant and real, and discernible not merely to theorists or scholars but to practical, hard-headed businessmen; in a word, it must be "substantial." But substantiality, in the sense used in Section 7, is not a precisely ascertainable quantity; if the statute is to have meaningful application, the courts and the Commission must be content with approximations and estimates. In the *Philadelphia National Bank* case, the Supreme Court, confronted with a conventional horizontal merger, held that where such a merger conferred a 30% market share on the acquiring firm and significantly enhanced the combined market shares of the leading firms in the market (by more than 33%), the merger was unlawful, absent mitigating circumstances. The percentages selected by the Court as manifesting undue concentration were admittedly only rough indicators that the merger would have the effect on competition specified in Section 7; but, in the absence of any more precise indicators, they were deemed to satisfy the statute's requirements.

The merger at bar, because it is not a conventional horizontal or vertical merger, does not afford the tribunal which must decide its legality the ready crutch of percentages. The market structure variable—condition of entry—here involved, unlike concentration (or foreclosure, in the case of a conventional vertical merger), is not even roughly translatable into a percentage. We cannot say that barriers to new entry into the liquid bleach industry have been raised, as a result of this merger, by 10%, 50% or any

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other exact figure. Nor do the raw figures on, say, cost savings in advertising enabled by the merger permit any dependable quantitative appraisal of the impact of the merger on existing barriers to entry. But the difference here between substantial and insubstantial, like that between night and day or childhood and maturity, is no less real because the dividing line cannot be precisely drawn.

If mergers not falling within certain familiar categories, such as "horizontal" and "vertical," are to be effectively subject to Section 7, as Congress plainly intended them to be, other means—non-percentile and non-quantitative—of roughly, but fairly, estimating the substantiality of a merger's probable adverse effect on competition in the relevant market, must be found. There is, of course, only one place to look for such tools—the area of the basic policy considerations which moved Congress to enact Section 7 in its amended form and which must therefore govern the enforcement of the statute. We find that there are five factors in this case which, taken together (we need not, and do not, consider whether one or more of these factors, taken separately, would be dispositive of the case), persuade us that the instant merger violates Section 7. This set of factors plays the same role in the decision of this case as percentage ratios play in the decision of other merger cases, that of enabling the deciding tribunal to infer with reasonable assurance that the merger has the specified statutory effect, namely, of probably lessening competition substantially, or tending to create a monopoly, in the relevant market. These factors are: (1) the relative disparity in size and strength as between Procter and the largest firms of the bleach industry; (2) the excessive concentration in the industry at the time of the merger, and Clorox's dominant position in the industry; (3) the elimi-

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nation, brought about by the merger, of Procter as a potential competitor of Clorox; (4) the position of Procter in other markets; and (5) the nature of the "economies" enabled by the merger.

First. An important consideration is the very great discrepancy in size between Procter and, not only Clorox, but any firm in the liquid bleach industry. In 1957, Procter's sales of packaged detergents alone were 10 times the total sales of Clorox and 8 times the total sales of all of Purex's products combined. Procter's total sales were more than 20 times the total sales of Purex and more than 25 times the total sales of Clorox. In fact, Procter's advertising and sales promotion budget in 1957 was substantially larger than the combined total sales of Purex and Clorox, and very many times the size of Clorox's advertising budget. Such comparisons could be multiplied; they show plainly that Procter is of a different order of magnitude from that of the principal firms in the liquid bleach industry. Indeed, as has been observed, Procter's financial resources and scale of operations overshadow the entire liquid bleach industry.

A size disparity of this magnitude is significant in several ways. First, it is a reliable indicator that the cost advantages enabled by the merger will be substantial and will substantially affect competitive conditions in the market. It would not be practicable to attempt a full-scale cost study of the firms involved in a merger, with a view toward predicting the actual, quantitative impact of the merger on competition. See Bok, *supra* note 18, at 285-86. We must make do, as has been pointed out, with less exacting but nonetheless useful working criteria; and in the circumstances involved in this case, the scale relationship between the acquiring firm and the principal firms in the

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relevant market is such a criterion. A merger between Clorox and, say, Purex might not enable substantial cost advantages, since Purex is not very much larger than Clorox; and the acquisition by Procter of, say, a small automobile manufacturer, even if the acquisition enabled substantial cost savings, would not be likely to impart a decisive competitive advantage to the acquired firm, given the scale of its competitors. But we have in this case a situation in which the pooling of expenditures by the merging firms places the acquired firm in a size class many times greater than that in which its own expenditures placed it and many times greater than that of any of its competitors. The inference is warranted, therefore, that the effect of this merger is to enable substantial cost savings which impart a substantial competitive advantage to the acquired firm.

To be sure, we might hesitate to draw such an inference in the case of a merger between firms in unrelated industries, or where the obtaining of cost advantages as a result of the merger depended on complex technological factors. But it has been found that Procter and Clorox are functionally closely related firms, the integration of whose marketing activities is not at all a remote hypothesis. And we have found also that the most substantial cost savings obtainable as a result of the merger, savings in the cost of advertising, depend principally on nothing more arcane than the total amount of the pooled expenditures for advertising on a particular network or in a particular magazine.

Second, the size disparity of the acquiring firm vis-à-vis the firms in the relevant market has an obvious materiality where, as here, that market is strongly marked by product differentiation through mass advertising. The effectiveness of advertising, we have seen, is a function in part of

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sheer weight, of the sheer volume of a firm's expenditures for advertising. It is therefore intensely relevant not only that Procter must in absolute terms be deemed a large and affluent corporation well able to finance large advertising campaigns, but, more important, that the firms in the liquid bleach industry are decidedly small and weak *relative* to Procter.

Third, size disparity of the unusual degree involved in this case takes on special significance in light of Congress' expressed concern, in amending Section 7, with the preservation, to the extent practicable and consistent with economic and social progress, of competitive opportunities for small business.

Prior to the advent of Procter, household liquid bleach was basically a small-firm industry. The industry's total sales were less than \$100,000,000 annually (i.e., less than 10% of Procter's total sales); many very small firms, perhaps as many as 200, were active in the industry; and the low costs of manufacturing enabled a firm to produce liquid bleach with a relatively small capital investment. Clorox, to be sure, overshadowed the other firms in the industry, but with assets of only \$12,600,000, Clorox itself could hardly be regarded as more than a small medium-sized firm. The distinctive nature of the industry threatens now to be utterly transformed by the substitution, for Clorox, of a billion-dollar corporation. Not only does Procter's great size and wide experience permit advertising and sales promotions on a scale hitherto unknown in the liquid bleach industry, but the remaining firms may now be motivated to seek affiliation by merger with giant companies. The practical tendency of the instant merger, then, is to transform the liquid bleach industry into an arena of big business competition only, with the few small firms

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that have not disappeared through merger eventually falling by the wayside, unable to compete with their giant rivals.

To be sure, there may be firms in this industry that are so small—firms with a purely neighborhood business which engage only in local advertising—as to be relatively unaffected by the substitution of Procter for Clorox, although such firms might very likely be the first casualties in any attempt by Procter to increase Clorox's market position through enhanced advertising or other marketing activities. Nevertheless, in the range between these very small firms, at the lower end, and Clorox, at the upper end, are to be found a number of relatively small firms whose continued existence as independent entities is gravely threatened by this merger.

Precisely this phenomenon, the transformation through mergers of a small-business into a big-business industry, was at the heart of Congress' concern with what it conceived to be an accelerating trend toward excessive concentration of economic power. In the deliberations leading to the amendment of Section 7, illustration after illustration was cited of industries, formerly characterized by the vigorous competition of small firms on a footing of approximate equality, transmuted by mergers into arenas of "monopolistic competition." "This manifest Congressional policy has a place in the enforcement of Section 7, and it cannot be disregarded in the instant case, where over 100 small firms, most with assets of less than \$75,000—not to mention prospective small-firm entrants—must now contend with Procter's vast, wide-flung enterprise. In this respect, we may compare the Supreme Court's *Brown Shoe*

⁴⁴ See, e.g., H.R. Rep. No. 1191, 81st Cong., 1st Sess. 3 (1949); *Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms*, op. cit. *supra* note 13, at 15.

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decision, holding unlawful a merger that did not itself create or aggravate an oligopolistic market structure, but, rather, was feared to be the first step in the transformation of a traditionally small-business, atomistic industry into one dominated by corporate giants.⁴⁵

It should be very clear that, in deeming Procter's size a pertinent consideration in the decision of this case, we are most emphatically *not* adopting any view that business *per se* is anti-competitive or undesirable and should be attacked under Section 7 or any other antitrust statute. Procter's size is significant in this case only insofar as it is hugely disparate compared with the size of the firms in the relevant market. Disparity of size, not absolute size, has importance in a merger case of this kind. Moreover, we do not suggest that size disparity is relevant to the decision of every merger case. Quite possibly, there are industries in which size disparity has little or no competitive significance. But we are dealing, in this case, with an industry in which advertising figures very prominently as a factor in competition. And not only is effective advertising at least a partial function of sheer weight (and may, indeed, only be fully practical for a large regional or national seller), which in turn is a function of the financial scale and capacity of the advertiser, but the discount structure of the advertising industry favors very large, national advertisers to an unusual extent. As we have seen, a multi-million dollar diversified firm such as Purex may not be able to qualify for substantial advertising discounts, while a firm the size of Procter can qualify for very substantial such discounts indeed. Size, then, is a

⁴⁵ See Adelman, *supra* note 12, at 241; Dean, *What the Courts Are Deciding: An Economist's View*, in *The Climate of Antitrust—Second Conference on Antitrust in an Expanding Economy* 23, 35 (National Industrial Conf. Bd. ed. 1963).

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factor bearing significantly on competition in the special circumstances of this case, and we need not, and do not, have occasion to expatiate in general terms on the significance of bigness in the application of Section 7 and other antitrust statutes.

Second. Our conclusion, in the foregoing discussion, that liquid bleach is an industry in which Congress would not have wished to see domination by large firms, and that the size disparity of Procter vis-à-vis the small firms of the industry is likely to have a significant effect on the competitive structure of the industry, is not, we think, affected by the fact that, at the time of the acquisition, the market structure of the industry, from the standpoint of the maintenance of a competitive regime, was already decidedly unhealthy. On the contrary, this factor has positive weight in our determination that the merger is unlawful. As the Supreme Court has stated, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia National Bank, supra*; at 365, n. 42. A merger that aggravates an already oligopolistic market structure, not by affecting the concentration ratio, as was the case in *Philadelphia National Bank*, but by affecting some other market structure variable, such as condition of entry, is highly suspect under Section 7.

It is arguable, to be sure, that the market structure of the liquid bleach industry was already so inauspicious that the substitution of Procter for Clorox cannot have made things worse, that to a firm with resources of a million dollars or less, confined to a small regional market, the difference between a Clorox and a Procter as a competitor must be largely academic. Whatever deleterious effect on competition Procter's entry into an atomistic market might

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have had, it might be argued, its entry into a market dominated by one firm, by purchase of that firm, could have had no measurable such effect: the market was already rigidly non-competitive.

We are not persuaded by this argument. Despite Clorox's ascendancy, competition has never been wholly absent from the liquid bleach industry. The industry's non-competitive-ness has always been relative, rather than absolute. The record is replete with instances of local, often intense, price rivalry (for example, the Erie, Pennsylvania, incident) and other kinds of competition (for example, in container design). The substitution of Procter for Clorox, by lending further rigidity to an already oligopolistic industry, could eliminate what competition remains.⁴⁶ Even if Procter's entry into the industry by purchase of Clorox has no immediate impact on competitive behavior, which is by no means clear, it must eliminate virtually all possibility of an eventual movement toward deconcentration in the liquid bleach industry. The barriers to entry, already formidable, become virtually insurmountable when the prospective entrant must reckon not with Clorox, but with Procter.

In addition, by taking the place of Clorox, the dominant firm in the highly concentrated liquid bleach industry, Procter obtains a protected market position built up by Clorox over many years, and, by virtue of Clorox's position of strength in the industry, Procter may be able to strengthen its position in other markets. Economists teach that the possession of market power enables a firm to derive higher profits ("monopoly profits") from its activities in the market than it could under more competitive conditions; the additional profits, in turn, endow the firm with

⁴⁶ See *Consolidated Foods Corp.*, F.T.C. Docket 7000 (decided November 15, 1962), p. 21; Bok, *supra* note 18, at 310; Blair, *supra* p. 51, at 693.

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added power to meet its rivals in other markets. In this fashion, substantial market power, which Clorox, as the dominant firm in an oligopolistic market, seems clearly to possess, is transferable as between seemingly unrelated industries.⁴⁷ This kind of leverage has long been familiar in many contexts of antitrust enforcement. See, e.g., *United States v. Great A. & P. Tea Co.*, 173 F. 2d 79, 86-87 (7th Cir. 1949). For example, it is one of the premises upon which various forms of vertical integration have been held unlawful. See, e.g., *Reynolds Metals Co. v. F. T. C.*, 309 F. 2d 223 (D.C. Cir. 1962). It was recently deemed material in a Section 7 proceeding involving a market-extension merger. *Foremost Dairies, Inc.*, F. T. C. Docket 6495 (decided April 30, 1962), p. 44.

Since Procter is already a leading manufacturer of a number of products, its acquisition of Clorox, by strengthening Procter's aggregate market position, may lead to an impairment of competition in many industries besides liquid bleach. And since Clorox and Procter are engaged in the manufacture of closely related products, more direct possibilities of exploiting in other markets Clorox's substantial market power arise—for example, the use of Clorox bleach, as a tying product, loss leader, or cross-coupon offering, in connection with efforts to promote other Procter products. These too are forms of extending monopoly or market power that have long been familiar in antitrust enforcement. See, e.g., *Northern Pac. R. Co. v. United States*, 356 U. S. 1. The president of Procter put the matter succinctly: "We may be able to derive addi-

⁴⁷ See Burns, *The Decline of Competition* 453 (1963); Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 142-150 (1964); Adelman, *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 45-46 (1949); Stigler, *supra* note 36, at 184; Blair, *supra* p. 51, at 686-87; Comment, 72 Yale L. J. 1265, 1269, n. 22, 1270, no. 28 (1963).

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tional value from the Clorox name for other new and related products." Purex, for example, is already hard pressed to compete effectively with Clorox in the liquid bleach industry and with Procter in the abrasive cleanser, packaged detergent, and toilet soap industries; it may find itself in a powerful competitive pincers as the result of the fusion of its leading rivals in the several industries in which it is active.

Moreover, it would be a curious result, and one hard to reconcile with the Supreme Court's emphasis on the importance of fostering deconcentration in an already unduly concentrated industry,⁴⁸ for this Commission to hold that a firm, if it succeeds in dominating, and substantially eliminating competition in, its own market, thereby becomes freely salable at a high premium to a giant conglomerate enterprise. For the Commission to conclude that the acquisition of a firm which has successfully snuffed out most of the competitive vigor in its market raises no question under Section 7, would be to provide an incentive to firms to achieve market dominance in order to become attractive offerings to the large conglomerate corporations.

In light of these considerations, we are persuaded that a merger involving a leading firm in a market is already well on the way to a non-competitive structure may be unlawful under Section 7 even where the aggravation of non-competitive market conditions by the merger may seem relatively slight because of the already advanced oligopoly condition of the market. Perhaps conceptual difficulties are encountered if such a merger is deemed to violate Section 7's "substantially to lessen competition" clause, since effective competition may already have substantially disappeared. If so, resort may be had, with

⁴⁸ See pp. 57-58 above. Cf. Edwards, *Big Business and the Policy of Competition* 125 (1956).

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entire propriety, to the statute's tendency-to-monopoly clause. For, "tend to create a monopoly" clearly includes aggravation of an existing oligopoly situation." *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D.N.Y. 1958). See Blair, *supra* p. 51, at 699-700. Cf. p. 27, n. 23 above.

Third. A factor closely related to the foregoing is that the merger eliminates the salutary effect of Procter as a *potential* competitor of Clorox in liquid bleach. At the time of the merger, Procter was a progressive and experienced manufacturer of many products in the same product line as liquid bleach; it had in the past frequently extended its product line by introducing a new brand in an industry in which it had not theretofore been active; it was one of the very few manufacturers of household products in the same general line as liquid bleach that was powerful enough to challenge, with some hope of success, Clorox's entrenched position in the bleach market; and it had actually pondered the possibility of entry into the liquid bleach market on its own. By virtue of all these facts, Procter must have figured as a tangible influence on Clorox's policies until the merger eliminated it as a potential competitor. Procter, though *in absentia*, was nonetheless, by reason of its proximity, size, and probable line of growth, a substantial competitive factor in the liquid bleach market. We have said that the possibility of new entry may exercise a restraining influence upon oligopolistic firms, inclining them to maintain prices at a level low enough to discourage entry. Prior to the merger, Procter was not only a likely prospect for new entry into the bleach market, it was virtually the only such prospect. Once the threat of Procter's entry vanished, one of the last factors tending to preserve a modicum of competitive pric-

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ing and business policies in the liquid bleach industry was removed. As the Commission, in a related context, has had occasion to observe, "When market concentration is high, the main, and sometimes the only, restraint on the use of market power by oligopolistic sellers is potential competition." *Foremost Dairies, Inc., supra*, at 50.

We have no occasion to speculate on such questions as whether or not Procter, had its acquisition of Clorox been blocked, would in fact have entered the bleach industry on its own, or whether or not, had it done so, the result would have been to increase competition in the industry—although, with reference to the second question, we note the Supreme Court's recent observation that "one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." *Philadelphia National Bank, supra*, at 370. See Kaysen and Turner, *Antitrust Policy* 135 (1959). It is sufficient that the tangible possibility of Procter's entry on its own into the liquid bleach industry was a continuing and important pro-competitive influence in that industry, and that the acquisition of Clorox, by eliminating that possibility, thereby removed a critical check on the power of Clorox to stifle effective competition in the sale of household liquid bleach.

Fourth. Another factor which supports a finding that this merger is illegal is Procter's strong market position in other (and larger) industries, notably packaged detergents, which we have already mentioned. No rigorous analysis of market structure in the other industries in which Procter is active was attempted in this case. It would be impractical, in light of the critical importance of channeling Section 7 proceedings within reasonable bounds of simplicity, to undertake, in every case of a conglomerate

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merger, a comprehensive study of each market in which the conglomerate enterprise operates. But, if we are not entitled to infer that Procter is able to subsidize Clorox's activities in the liquid bleach market out of "monopoly profits" (including profits attributable to market power short of outright monopoly) gleaned by Procter from its activities in other markets, or otherwise to transfer monopoly or market power enjoyed in other markets into the bleach market (see JA 452a), we at least know, from the record of this case, that Procter is well established in a number of separate product markets (see pp. 10-11, n. 4 and pp. 11-12 above). We know, for example, that Procter possesses a 54.5% share of one market, packaged detergents, in which three firms account for 80% of total sales and which we earlier found (see JA 406a) closely resembles the household liquid bleach industry. On these facts, it is scarcely to be doubted that Procter, the biggest of the "Big Three" of the household cleansing agents industry, possesses some degree of market power in the packaged detergent and other product markets within the general field, although perhaps not so much as Clorox possesses in its market.

At the least, Procter's manifest strength in markets other than liquid bleach rebuts any inference that Procter cannot wield the advantages that flow both from its own financial size and strength and from the dominant position in the liquid bleach industry enjoyed by Clorox. If Procter were shown to be spread thin throughout its many fields of endeavor, the significance of its apparently decisive competitive advantage over its liquid bleach competitors might be impaired; but that, clearly, is not the case.

Procter's strength in other markets may have, as well, a positive—though by no means conclusive—significance

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in appraising the effect of this merger on competition in the liquid bleach market. Even if such strength has not been proved to reach the level at which monopoly profits or other fruits of great market power are forthcoming, it is relevant to the psychological response of the members of the liquid bleach industry to Procter as a competitor. To the extent that Procter is thought by them to be not only a large and affluent firm, but also a powerful firm, in terms of market power enjoyed in related markets and possibly transferable into the bleach market, its prowess as a competitor gains an added and even sinister dimension in the eyes of its liquid bleach rivals—a factor of considerable importance to the impact of the merger on competition in the bleach industry. Cf. Blair, *supra* JA 442a, at 690; Edwards, *supra* n. 22, at 335-36.

Thus, just as ownership of Clorox may enable Procter to enhance its competitive edge in other markets, so Procter's position in other markets may enhance its dominance, through its acquisition of Clorox, of the liquid bleach industry. Purex, we noted, now competes with Procter in the liquid bleach as well as in the packaged detergents industry, and it may be inclined to act cautiously in the liquid bleach market for fear of provoking Procter's retaliation along the whole front of Purex's activities.

The short of it is that a conglomerate merger involving firms which have dominant power in their respective markets tends to reinforce and augment such power. Procter's willingness to pay a very substantial amount of money for the good will of Clorox bespeaks its ability, as a large and diversified firm which has seemingly exhausted the possibilities of further expansion in the numerous markets in which it has won a dominant position, to use the ample surplus it has accumulated in the process in order to achieve

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dominance in still another market by purchase of that market's dominant firm." We emphasize here that we are discussing only corporate expansions through *acquisition*, and not through internal growth. In enacting Section 7, which deals only with mergers, Congress was expressing its special concern with those *acquisitions* which result in the mutual entrenchment of unhealthy market situations, and thus bear grave consequences for the future of our competitive economy.

Fifth. In stressing as we have the importance of advantages of scale as a factor heightening the barriers to new entry into the liquid bleach industry, and so impairing competitive conditions in that industry, we reject, as specious in law and unfounded in fact, the argument that the Commission ought not, for the sake of protecting the "inefficient" small firms in the industry, proscribe a merger so productive of "efficiencies." The short answer to this argument is that, in a proceeding under Section 7, economic efficiency or any other social benefit resulting from a merger is pertinent only insofar as it may tend to promote or retard the vigor of competition. As the Supreme Court has held (see JA 410a-411a), Congress did not mean the adjudicators of Section 7 cases to attempt to weigh the ultimate social and economic merits and demerits of a merger, but only to determine its effect on competition and monopoly. A merger that results in increased efficiency of production, distribution or marketing may, in certain cases, increase the vigor of competition in the relevant

* See Klaw, "The Soap Wars: A Strategic Analysis," *Fortune*, June 1963, pp. 122, 198; Blair, *supra* p. 51, at 693; Boggis, *Merger Movements in Industry—The Diversification Threat*, 13 *Cartel* 32, 37 (Jan. 1963). In this connection we note that between 1955 and 1957, Procter acquired, besides Clorox, a manufacturer of paper products and several manufacturers of food products, for a total consideration, in cash and stock, of about \$30,000,000.

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market.⁵⁰ But the cost savings made possible by the instant merger serve, we have seen, not to promote competition, but only to increase the barriers to new entry into the relevant market, and thereby impair competition.

A more complete answer to the argument that this merger should be upheld on account of its "efficiencies" is that cost advantages of scale are of more than one kind, and that the kind involved in this merger, far from representing a net social benefit, is independently offensive to at least the spirit, if not the letter, of the antitrust laws. For one thing, the savings chiefly involved here, which are savings in advertising and sales promotions (Procter does not contend that the merger will enable substantial economies of production or physical distribution), are, it seems, achievable only by firms of very large absolute size. See Bain, *Industrial Organization* 170, 172-73 (1959). When we reflect that a firm, Purex, with total sales of almost \$50,000,000 in 1957 and a proportionally large advertising budget, was evidently unable to obtain any but the minimum volume discounts available to large television advertisers, we can only conclude that the large-scale advertising "economies" involved in this case represent price concessions available only to giant firms, and bear little relationship to ordinary notions of economic "efficiency."

More important, while we do not doubt that marketing economies, including those of advertising and sales promotion, are as socially desirable as economies in production and physical distribution, there does come a point "at which product differentiation ceases to promote welfare and be-

⁵⁰ However, the danger is very great that where any two firms in an oligopolistic market merge, the fruits of the merger will be used not to enhance, but to retard, competition. See *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 399-400 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); Comment, 68 Yale L. J. 1627, 1674 (1959).

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comes wasteful, or mass advertising loses its informative aspect and merely entrenches market leaders.”⁵¹ We think that point has been reached in the household liquid bleach industry. In short, the kind of “efficiency” and “economy” produced by this merger is precisely the kind that—in the short as well as the long run—hurts, not helps, a competitive economy and burdens, not benefits, the consuming public.

Advertising performs a socially and economically useful function insofar as it educates the consumer to the broad range of product alternatives that he should consider in seeking to make an optimal allocation of his necessarily limited economic resources. Advertising, then, should stimulate competition and, by increasing the sales of the advertised product, lower the unit cost of that product. But this process is distorted in the case of a homogeneous product, such as household liquid bleach, produced under conditions of oligopoly, such as obtain in the liquid bleach industry. Since there is no reason (save cheapness and availability) for a consumer to prefer one brand of liquid bleach over another, there is no real need for the various manufacturers to incur as heavy advertising expenses as they do—except to protect their market shares. Heavy advertising, under such conditions, does not, in any meaningful sense, serve to broaden the consumer’s range of product alternatives. Moreover, since oligopolists typically refrain from price competition, large advertising expenditures in the liquid bleach industry have not resulted in a lower unit price to the consumer. (Clorox, the most extensively advertised liquid bleach, is also the most expensive for the consumer.) Thus we have a situation in which heavy advertising benefits the consumer, who pays for such

⁵¹ Dirlam, *supra* note 13, at 103.

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advertising in the form of a higher price for the product, not at all.⁵²

This situation is simply an example of a latent ambiguity in the term "competition." All forms of business rivalry are, in a sense, "competition," but not necessarily in the sense contemplated by Section 7 and the other antitrust laws. Price cutting is normally a manifestation of healthy competition. Predatory price cutting, however, is not. It tends to stifle true competition, and is often itself a violation of the antitrust laws. Similarly, sellers who vie with one another, through advertising and other promotional activities, to create a consumer preference for their brands, may be laudably engaged in competition such as the antitrust laws are intended to protect. On the other hand, such sellers may, as here, be engaged in brand "competition" to the end only of maintaining high prices, discouraging new entry, and, in general, impairing, not promoting, socially useful competition.

In sum, the undue emphasis on advertising which characterizes the liquid bleach industry is itself a symptom of and a contributing cause to the sickness of competition in the industry. Price competition, beneficial to the consumer, has given way to brand competition in a form beneficial only to the seller. In such an industry, cost advantages that enable still more intensive advertising only impair price competition further; they do not benefit the consumer.

E. POST-ACQUISITION EVIDENCE

In holding this merger unlawful under Section 7, we expressly decline to place reliance on certain facts which, in the view of the hearing examiner, helped demonstrate

⁵² See Taplin, *Advertising: A New Approach* 107-110 (1963); Blair, *supra* p. 51, at 681.

Opinion of the Commission

the merger's unlawfulness. It should be noted that the hearings in this case were conducted, for the most part, under the aegis of the Commission's decision in *Pillsbury Mills, Inc.*, 50 F.T.C. 555. Experience in the trial of merger cases, now confirmed by the Supreme Court, has exposed the fallacy of supposing that a broad-gauged inquiry into every business and economic fact remotely relevant to the economic effect of a merger—the kind of inquiry the Commission in *Pillsbury Mills* held it must undertake under Section 7—is productive of more rational decisions. Broad principles of relevancy and materiality may have been appropriate when the law of Section 7 was still fluid and unsettled, but it is now clear that the path toward just and effective enforcement of the statute lies in the direction of narrowing the scope of necessary or permissible inquiry.

In the particular circumstances here, most of the considerable amount of post-acquisition evidence introduced at the hearings was entitled to little weight. We have already canvassed the considerations that make such evidence rarely of much probative value (see JA 427a-428a); suffice it to say that those considerations are applicable in this case. Were the post-acquisition evidence in this case to be considered, it might furnish some support for the finding we have made wholly on the basis of other factors. Since the merger, Clorox's market share has continued to increase. In 1961, Clorox's overall market share was 51.5% as compared to 48.8% in 1957, while its share in, for example, the New England region, had risen in this period from 56% to 67.5%. Procter has introduced sales promotions on a fairly large scale (\$2,000,000 in four years) in behalf of Clorox. Purex has acquired the fourth largest liquid bleach producer (thus increasing concentration in the industry), after, and according to an official of Purex,

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in part because of, losing a "brand war" to Clorox-Procter in Erie, Pennsylvania. And Procter has obtained, for Clorox, certain advertising economies. None of these phenomena, we think, proves that the merger is unlawful, for it is difficult to know to what extent they were produced by the merger, and not by other factors. However, if we were to consider them, we would have to find that they corroborated or confirmed the conclusion of illegality grounded in solid evidence of the structure of the market at the time of the merger.

Had Procter in fact fully integrated the marketing and other activities of Clorox in its overall organization, perhaps dramatic post-acquisition changes, directly traceable to the merger, would have occurred. But, save for taking advantage of certain advertising cost advantages and introducing sales promotions, Procter in the period covered by the post-acquisition evidence has carefully refrained from changing the nature of the Clorox operation; even the network of independent brokers has been retained. Such restraint appears to be motivated by a general Procter policy of moving slowly and cautiously in a new field until the Procter management feels totally acclimated to it. It is possible, as well, that the pendency of the instant proceeding has had a deterrent effect upon expansionist activities by Procter in the liquid bleach industry.

Most important, however, so far as post-acquisition evidence in this case is concerned, is the fact that there has been no dramatic change in market structure or behavior in the years since the merger. This means that there is no reason to suppose that an analysis based upon market structure at the time of the merger need be reexamined, qualified or discarded in the light of subsequent events. Where, as here, the period since the acquisition has been relatively uneventful, there is certainly no basis for accord-

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ing particular weight to the post-acquisition evidence that found its way, needlessly, into the record.

IV. RELIEF

The last point to be considered is the nature of the relief to be ordered. The order in the initial decision would require respondent to divest itself of the acquired assets through sale. Respondent raises two main objections to this order.

First, it contends that divestiture is not called for in these circumstances, because the public interest can be protected by an order enjoining Procter from exercising the opportunities for enhancing Clorox's dominance of the liquid bleach industry which the Commission has found resulted from the merger. It is settled, however, that divestiture is normally the appropriate remedy in a Section 7 proceeding. *United States v. E. I. duPont de Nemours & Co.*, 366 U. S. 316. This case would be a particularly inappropriate one in which to make an exception. The anti-competitive effects of this acquisition are not enjoinable. They inhere in the very presence of Procter, standing in the place of Clorox in the liquid bleach industry, and can be corrected only by restoration of the market structure, so far as possible, as it existed at the time of the acquisition.

Second, respondent objects to the provision in the order entered by the hearing examiner that sale of the acquired assets cannot be made to anyone "who is at the time of divestiture, or for two years before said date was, a stockholder . . ." of Procter. Recognizing that the purpose of a Section 7 proceeding is in no sense punitive, that the sale of an absorbed firm may be difficult to accomplish within a reasonable period of time, and that in the case of a large

Letter Amending Opinion

publicly-owned corporation the common ownership by the shareholders of both the acquired and the acquiring firms is not necessarily inconsistent with a meaningful separation of the firms, the Commission recently approved an order permitting a Section 7 respondent to spin off the acquired assets to a new corporation, the stock of which would then be distributed to the shareholders of respondent. *Consolidated Foods Corp.*, F. T. C. Docket 7000 (decided Nov. 15, 1962), p. 22; see *id.*, Memorandum Accompanying Final Order (issued March 22, 1963). There is no apparent reason why this respondent should not be permitted thus to spin off the acquired assets to a new corporation or corporations, if it so desires, and we have modified the order entered by the hearing examiner accordingly.

Commissioner Anderson concurs in the result.

November 26, 1963.

FEDERAL TRADE COMMISSION
WASHINGTON 25, D. C.

OFFICE OF THE SECRETARY

December 19, 1963

Dinsmore, Shohl, Barrett,
Coates & Deupree
Union Central Building
Cincinnati 2, Ohio

Royall, Koegel, Harris & Caskey
1730 K Street, N. W.
Washington 6, D. C.

William J. Boyd, Jr., Esquire
Federal Trade Commission
Washington 25, D. C.

466a

Letter Amending Opinion

Re: The Procter & Gamble Company
Docket 6901

Dear Sirs:

The opinion of the Commission in the above proceeding, issued November 26, 1963, has been emended in the following particular: The word "come" has been substituted for the word "reach" in the top line on page 66 of the opinion.

By direction of the Commission.

/s/ JOSEPH W. SHEA
JOSEPH W. SHEA,
Secretary.

Complaint to Declare Invalid Certain Orders

**EXTRACTS FROM THE RECORD IN THE PROCTER
& GAMBLE COMPANY v. FEDERAL TRADE COMMIS-
SION, ET AL., CIVIL ACTION No. 3798-61, USDCDC**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 3798-61

THE PROCTER & GAMBLE COMPANY, an Ohio cor-
poration, having its principal office and place of busi-
ness at 301 East Sixth Street, Cincinnati, Ohio,

Plaintiff,

—against—

**FEDERAL TRADE COMMISSION; PAUL RAND
DIXON, SIGURD ANDERSON, WILLIAM C.
KERN, PHILIP ELMAN, EVERETTE MacIN-
TYRE**, individually and as Commissioners of the Fed-
eral Trade Commission; and **EVERETT F. HAY-
CRAFT**, individually and as Hearing Examiner of the
Federal Trade Commission, Pennsylvania Avenue at
6th Street, N.W., Washington, D. C.,

Defendants.

**COMPLAINT TO DECLARE INVALID CERTAIN
ORDERS ISSUED BY THE DEFENDANTS AND
FOR INJUNCTIVE RELIEF**

(Filed November 24, 1961)

1. This is an action of a civil nature to declare the
invalidity of and to obtain an injunction temporarily and
permanently restraining the defendants and each of them
from proceeding under an order issued by the Federal
Trade Commission on June 15, 1961, and an order made by
defendant Everett F. Haycraft on November 6, 1961, in a

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proceeding had by that Commission entitled "In the Matter of The Procter & Gamble Company, a corporation, Docket No. 6901." This action arises under the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. § 1001, et seq.), and under provisions of the Clayton Act (64 Stat. 1125, 15 U.S.C. 21), and also under the Federal Declaratory Judgment Act (48 Stat. 955, 28 U.S.C. 2201, et seq.), and Amendment V of the Constitution of the United States. Jurisdiction of this Court is conferred by District of Columbia Code §§ 11-305, 11-306, and § 24(8) of the Judicial Code (28 U.S.C. § 1337) and by §§ 6(a) and 10(e) of the Administrative Procedure Act.

The defendants individually and, respectively, as the Federal Trade Commission, and as Commissioners of the Federal Trade Commission, and as a Hearing Examiner of the Federal Trade Commission, are found in the District of Columbia, maintain their offices or are to be found in the District of Columbia, and the illegal acts and threatened illegal acts of the defendants have taken place within or will, if not enjoined, take place in the District of Columbia.

Description of the Parties

3. Plaintiff is a corporation duly organized and existing under the laws of the State of Ohio, with its principal office and place of business at 301 East Sixth Street, Cincinnati, Ohio.

4. The defendants, Paul Rand Dixon, Sigurd Anderson, William C. Kern, Philip Elman and Everette MacIntyre are duly appointed Commissioners of the Federal Trade Commission. The defendant Everett F. Haycraft is a duly appointed Hearing Examiner of the Federal Trade Commission.

Complaint to Declare Invalid Certain Orders**Definitions and Descriptions****5. As used in this complaint:**

(a) "Procter" means the plaintiff herein and the respondent The Procter & Gamble Company in said proceeding before the Federal Trade Commission, Docket No. 6901.

(b) "Clorox" means the Clorox Chemical Company, the assets and business of which were acquired by Procter on August 1, 1957, and its successor The Clorox Company, a wholly owned subsidiary of Procter.

(c) "Said Proceeding" means a proceeding commenced by complaint before the Federal Trade Commission and bearing Docket No. 6901, in which Procter was named as respondent.

(d) "Commission" means the Federal Trade Commission.

(e) "Hearing Examiner" means the defendant Everett F. Haycraft.

(f) "Commission's Counsel" means counsel appearing in said Proceeding in support of the complaint filed therein.

History of Said Proceeding

6. On May 28, 1957, Procter entered into an agreement with Clorox which provided in substance for the purchase by Procter of all of the assets and business of Clorox. This agreement (negotiations for which had been initiated by the representatives of Clorox) contained a provision that the rights and obligations of the parties thereunder were subject to the requirements of and compliance with any applicable Federal law. It was further provided that "if litigation or administrative proceedings in connection with such compliance are commenced prior to closing, then

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either party may on thirty days notice cancel and terminate this Agreement."

7. In the spring of 1957 the Commission commenced an investigation of said acquisition and in connection therewith asked for and received from Procter certain books, records and other documents, including a copy of said acquisition agreement of May 28, 1957.

8. Prior to the closing date of August 1, 1957 the Commission had before it all relevant facts concerning the acquisition by Procter of the assets and business of Clorox and was fully advised of the terms of the said contract of acquisition of May 28, 1957, including the right of the parties to cancel said agreement in the event that an administrative proceeding questioned the validity of said acquisition. Nevertheless, the Commission did not notify either of the parties to said acquisition agreement that there was any question with respect to said acquisition and the Commission did not request a delay in the consummation of said contract pending further investigation or study.

9. On August 1, 1957, not having received any indication from the Commission or any other governmental bureau, branch or department that the proposed acquisition was in any way questionable, Procter acquired the assets and business of Clorox in accordance with the terms of said agreement of May 28, 1957.

10. Thereafter, on September 30, 1957, the Commission without any notice or advance warning, and purporting to act pursuant to § 11 of the Clayton Act, commenced the Proceeding against Procter by the issuance of a complaint by the Commission. The said complaint purported to charge Procter with a violation of § 7 of the Clayton Act alleging that the acquisition by Procter of the assets and business of Clorox may have the effect of substantially

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lessening competition or tending to create a monopoly in the production and sale of household liquid bleaches in the United States. Said Proceeding so commenced was pending before the Commission or its Hearing Examiner from the date of issuance of said complaint until the issuance of an opinion and order by the Commission on June 15, 1961. Said opinion of the Commission expressly stated that the facts established on the trial of said Proceeding did not warrant the issuance of an order to cease and desist or of divestiture. To the contrary, the Commission found that the proof adduced on the trial of said Proceedings, for the period during which evidence had been offered by Commission's Counsel, was insufficient to sustain the complaint. Nevertheless, the Commission, on its own motion and without any notice or request by any of the parties to said Proceedings, purported to remand the said Proceeding to the Hearing Examiner in order to permit Commission's Counsel to try for a second time to establish facts sufficient to warrant the issuance of an order directing Procter to divest itself of all assets and properties of Clorox which it had acquired.⁴ In fact, it is the claim of the Commission that the said Proceeding is still pending before it and its Hearing Examiner.

11. A summary of some of the steps taken in said Proceeding, since the commencement of said Proceeding in 1957, is as follows:

(a) On November 4, 1957, Procter filed its answer in said Proceeding denying all charge of illegality.

(b) On December 5, 1957, Commission's Counsel served on Procter a broad subpoena *duces tecum* calling for the production of books, records and other material. While this subpoena was limited by the Hearing Examiner on Procter's motion, such limitation was stricken on March 26, 1958, as the result of an interlocutory appeal to the

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Commission, so that there became available to Commission's Counsel all of the material which such counsel believed he needed from Procter in connection with the presentation of his case.

(c) In the meanwhile, the Hearing Examiner scheduled and in fact held a large number of hearings in the cities of Cincinnati, San Francisco, Los Angeles, Chicago, Philadelphia, New York, Boston, Buffalo, Detroit and Washington, in which Commission's Counsel was given every opportunity to adduce all evidence available to him and the Commission in support of the allegations of the complaint issued in said Proceeding.

(d) Said hearings commenced on December 16, 1957.

(e) On August 26, 1958, Commission's Counsel closed his case in chief.

(f) From November 17th through November 26, 1958 and thereafter, in accordance with the Hearing Examiner's Schedule, from January 5th through January 9, 1959 Procter adduced evidence in Washington consisting of the testimony of fourteen witnesses. During the course of the hearings Procter identified 132 exhibits.

(g) Commencing on January 26, 1959 and concluding on February 12, 1959, Commission's Counsel offered rebuttal testimony in Washington.

(h) In the course of said Proceeding Commission's Counsel introduced oral testimony of thirty witnesses, making a record of 4,352 pages, and identified approximately 700 exhibits, comprising many hundreds of pages.

(i) A total record of 6,208 pages having been made and over 800 exhibits, totalling many thousands of additional pages, having been received, and both parties having rested, the hearings were concluded on February 12, 1959, when Commission's Counsel agreed that he would seek no further evidence if Procter entered into stipula-

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tions of fact. The stipulations were made and both parties thereupon consented, on February 12, 1959, to the Hearing Examiner's closing the testimony. Annexed hereto as Exhibit A are excerpts from the transcript of the hearing in said Proceeding for February 12, 1959, containing references to the said stipulations and the ruling of the Hearing Examiner closing the testimony.

(j) Thereafter, the parties to said Proceedings, including Commission's Counsel, filed numerous briefs and proposed findings of fact and conclusions of law.

(k) On June 17, 1960, the Hearing Examiner, reciting that the reception of evidence having been concluded, made an order that all proceedings before the Hearing Examiner in said Proceeding be closed. A copy of the order closing all proceedings before the Hearing Examiner is annexed hereto as Exhibit B and hereby incorporated herein and made a part hereof.

(l) On June 17, 1960, the Hearing Examiner, without having reopened the case or having been requested to do so by any party, including the Commission's Counsel, rendered his initial decision in said Proceeding. The said initial decision contained extensive findings of fact and conclusions of law. The Hearing Examiner found that there was evidence in the record indicating that the effect of the acquisition of Clorox by Procter may be to suppress competition and tend to result in increased concentration in the production and sale of household liquid bleach. Accordingly, the Hearing Examiner ordered Procter to cease and desist from violating § 7 of the Clayton Act and to divest itself of all assets acquired by Procter from the Clorox Chemical Company and to restore Clorox as a going concern in the manufacture and sale of household liquid bleach in substantially the same productive capacity as was possessed by Clorox at or immediately prior to the time of the acquisi-

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tion. A copy of the initial decision of the Hearing Examiner is annexed hereto as Exhibit C and hereby incorporated herein and made a part hereof.

(m) On July 15, 1960, notice of intention to appeal from the initial decision of the Hearing Examiner was filed by Procter. On that same date, notice of intention to appeal was filed by Commission's Counsel with respect to the alleged failure of the Hearing Examiner to make certain findings of fact in his initial decision and with respect to certain rulings of the Hearing Examiner during the course of the hearings.

(n) Briefs having been filed by all parties to said Proceeding, the Commission heard full argument on both appeals in said Proceeding on March 14, 1961.

(o) Neither by any briefs or oral argument nor in any other way did Commission's Counsel request the Commission to reopen or to remand the proceeding to the Hearing Examiner for any purpose whatever. The argument of Commission's Counsel in support of that portion of his notice of intention to appeal dealing with the Hearing Examiner's limitations upon counsel's proof, far from requesting a reopening of the proceedings, sought merely an adoption by the Commission of certain findings of fact and conclusions tendered by Commission's Counsel and based only upon the evidence already in the record.

Wrongful Acts of Defendants

12. On June 15, 1961, after the presentation and submission of the appeals, the Commission filed an opinion and order in which it disagreed with the conclusions of the Hearing Examiner. The Commission, after considering the evidence adduced at the hearings on said Proceeding concluded that it did not support the Hearing Examiner's conclusion as to the lessening of competition. The Commis-

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sion further held that as the record did not in its opinion contain an adequate basis for reaching a determination, the Commission "might dismiss the complaint." The Commission, however, did not follow such course, which was and is so clearly indicated by the applicable rules, laws and statutes. On the contrary, the Commission, without any charge or allegation by any party or by the Commission itself that there were any changed conditions of fact or law or changed circumstances or that there was any newly discovered evidence or indeed any additional evidence whatever which might change the result, made and issued an order remanding the proceeding to the Hearing Examiner for the reception of evidence relating to the competitive situation as it "presently exists" in the household liquid bleach industry. A copy of the Commission's opinion and order of remand is annexed hereto as Exhibit D and hereby incorporated herein and made a part hereof.

13. The said order of remand reopening the Proceeding, made by the Commission as aforesaid, was not only made without the request and without any showing by any party for such an order but without any notice to Procter that such action was contemplated or might be taken by the Commission and without an opportunity for Procter to take any position or defend itself with respect thereto.

14. The original trial was devoted almost entirely to evidence relating to the competitive situation in the household liquid bleach industry prior to the time of the said acquisition and subsequent thereto. In this connection, Commission's Counsel introduced in evidence the testimony of representatives of 13 manufacturers of liquid bleach located in various areas in the United States.

15. In spite of the voluminous evidence on the issue of the said acquisition by Procter, the Commission correctly concluded that the record did not support the complaint.

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But nevertheless, instead of performing its ministerial duty of dismissing the complaint, it improperly, unlawfully and capriciously remanded the Proceedings and, as will more fully appear below, subjected and intends to subject Procter to further proceedings with respect to the very subject matter as to which the record established no wrongdoing by Procter.

16. On November 6, 1961, the Hearing Examiner issued in said Proceeding a notice to the effect that, pursuant to and in conformity with the said order of remand made by the Commission on June 15, 1961, he was setting down the said Proceeding for further hearings commencing November 30, 1961. A copy of this notice is annexed hereto as Exhibit E and hereby incorporated herein and made a part hereof. This action of the Examiner, being based on the unlawful action of the Commission is likewise without validity.

17. In the course of the lengthy Proceedings herein, Procter has expended many thousands of dollars in the defense of said Proceeding. Among the substantial expenses incurred have been those necessitated by the making of lengthy studies and surveys, collating documents, obtaining market data, preparations to testify and testimony given by officers and employees of Procter and Clorox with respect to the liquid bleach industry as well as the competitive situation in that industry; the interviewing of many potential witnesses concerning the economic effects of said acquisition, as well as the preparation of findings and conclusions, briefs and arguments of the points involved in the said Proceeding, including principally questions relating to the competitive situation in the liquid bleach industry.

18. During the said preparation for and trial of the said Proceeding a portion of the business of Procter was

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seriously disrupted. Personnel in the various departments of Procter and Clorox were prevented from attending to their usual duties and business while engaged in the preparation for and giving of testimony in the said Proceeding.

19. During the trial of said Proceeding and upon the initial decision thereof by the Hearing Examiner, Procter was subjected to unfavorable publicity through Commission press releases or reports by the local press, as a consequence of which the public relations of Procter and Clorox were unfavorably affected.

20. The pendency of the lengthy Proceeding herein before the Commission has resulted in household liquid bleach business being operated in an atmosphere of doubt and uncertainty. Procter has been handicapped in making plans for its future in the household liquid bleach business. All of the foregoing uncertainties are detrimental to Procter and its stockholders.

21. If the action by the Commission and the Hearing Examiner under said illegal, unlawful and improper order of remand of June 15, 1961, is not enjoined herein, Procter will suffer irreparable injury and damage:

(a) All of the uncertainties in the conduct of Procter's business, as hereinabove alleged, and the expenses and other harmful results therefrom, will be indefinitely continued and perpetuated.

(b) Procter will be required to go to trial again upon the same issues already expensively litigated and adjudicated in its favor in said Proceeding. It will be required again to expend large sums of money and again to disrupt various departments and personnel for the purpose of again preparing to meet the same issues which have already been completely disposed of by said order and opinion of the Commission of June 15, 1961, that the evidence in the

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record was insufficient to sustain the complaint or warrant the issuance of an order against Procter.

(c) Procter, in the course of a retrial of the same issues previously disposed of, will again be subjected to unfavorable publicity whether in the form of press releases or reports by the local press of rehearings in said Proceeding.

(d) Procter will be subjected to an indefinite and never-ending litigation. For in the trial of any proceeding there must of necessity always be a lapse of time between the close of evidence and final determination. Accordingly, if the illegal action of the Commission is not enjoined by this Court, the Proceeding against Procter may be kept open forever by the expediency of successive remands to bring the evidence up to date.

22. As the Commission's purported order of remand of June 15, 1961 is not an order to cease and desist or of divestiture or other final order for which there is specific provision for review in the Clayton Act, the only recourse of Procter to obtain prompt, adequate and effective remedy by judicial action, to which it is entitled under the Administrative Procedure Act and the Constitution, is in this Honorable Court by means of the instant suit.

23. The said order of the Commission of June 15, 1961, in so far as it purports to remand said Proceeding to the Hearing Examiner, and in so far as it requires Procter further to again prepare and to defend the issues in this case (which issues have been previously disposed of by the Commission; as aforesaid) and also the order of November 6, 1961 of the Hearing Examiner seeking to implement said order of June 15, 1961, are arbitrary and capricious, void, beyond the Commission's jurisdiction, without any statutory right, power or sanction, violate the Clayton Act, the Administrative Procedure Act and the Rules of Practice of the Commission. Said order of the Commission

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deprives Procter of its property without due process of law in violation of Amendment V of the Constitution of the United States, for the following reasons, among others:

(a) Said order of the Commission, following more than four years of investigatory and trial proceedings, violates the Administrative Procedure Act, imposing upon the Commission the duty to conclude a case with reasonable dispatch.

(b) Said order was made and issued without any prior notice to Procter that the action taken by that order was contemplated by the Commission or was an issue to be disposed of upon the hearing before the Commission of said Proceeding.

(c) Said order violates the Clayton Act and the Commission's Rules of Practice in that it purports to reopen said Proceeding after the evidence and all proceedings in said Proceeding had been closed, as the Commission itself held, without any showing of compliance, or possibility of compliance, with the Act and the Rules of the Commission relating to reopening of proceedings.

(d) The said order is arbitrary and capricious in that it was made without request therefor by Commission's Counsel and without any showing that there was newly discovered evidence or indeed any further relevant evidence at all available for introduction in said Proceeding.

(e) The said order, made in excess of and without any statutory right, power or sanction but in derogation of the pertinent statutes and rules as aforesaid, aggravates the harassment of an already large and lengthy Proceeding and extends the disruption of Procter's business, thereby depriving Procter of its rights without due process of law.

(f) Said order of remand violates the requirement of impartial conduct by the Commission in that the Commission, by ordering a remand rather than dismissing the

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complaint as it is required to do where the evidence is insufficient to sustain it, has acted not in its quasi-judicial but in its prosecuting capacity for the purpose of giving to Commission's Counsel a further and additional opportunity to seek evidence to sustain the complaint and enable the Commission to make an order in accordance with its unsupported views, if not prejudgment, of the issues presented and the evidence to be adduced.

24. Procter will be irreparably damaged herein unless temporary and permanent injunction is issued enjoining the defendants and each of them from taking further action herein in pursuance of the said order or remand of June 15, 1961. Procter has no adequate remedy at law.

WHEREFORE, Procter prays that judgment may be made and entered:

(i) Declaring said order of June 15, 1961, made by the Commission in so far as it purports to remand said Proceeding to the Hearing Examiner for the taking of additional evidence, to be invalid, unlawful and unenforceable.

(ii) Declaring that the said opinion and order of the Commission in said Proceeding issued June 15, 1961, determine that there is not sufficient evidence in the record of said Proceeding to justify the issuance of an order to cease and desist or of divestiture and that, accordingly, said opinion and order constitute a dismissal by the said Commission of the said Proceeding against Procter.

(iii) Ordering and requiring the Commission to perform the ministerial act of dismissing the complaint in said Proceeding pursuant to the Commission's finding that the record before it did not sustain the complaint.

(iv) That temporary and permanent injunction issue enjoining the defendants and each of them, and their successors in office, from taking any further action in said Proceeding pursuant to said order of remand dated June

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15, 1961, and that the defendants and each of them and their successors in office, be enjoined from ordering any further hearings of any kind in said Proceeding.

(v) That the defendants and each of them, and their successors in office, be enjoined from relitigating the issues which have already been disposed of by the Commission's opinion of June 15, 1961.

(vi) That the defendants and each of them, and their successors in office, be temporarily, *pendente lite*, and permanently enjoined from taking any further action of any kind in said Proceeding.

(vii) That plaintiff have such other and further relief as to the Court may appear to be just and proper.

ROYALL, KOEGEL, HARRIS & CASKEY,

By /s/ KENNETH C. ROYALL
KENNETH C. ROYALL
and

/s/ FREDERICK W. P. LORENZEN
FREDERICK W. P. LORENZEN

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Attorneys for Plaintiff

Motion for Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action-No. 3798-61

THE PROCTER & GAMBLE COMPANY, an Ohio corporation, having its principal office and place of business at 301 East Sixth Street, Cincinnati, Ohio,
Plaintiff,

v.

FEDERAL TRADE COMMISSION; PAUL RAND DIXON, SIGURD ANDERSON, WILLIAM C. KERN, PHILIP ELMAN, EVERETTE MacINTYRE, individually and as Commissioners of the Federal Trade Commission; and EVERETT F. HAYCRAFT, individually and as Hearing Examiner of the Federal Trade Commission, Pennsylvania Avenue at 6th Street, N. W., Washington, D. C.,
Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, by its attorneys, on the complaint and affidavit of Dean P. Fite, verified on November 22, 1961 and all filed herein, moves this Court to issue a preliminary injunction *pendente lite* enjoining the defendants and each of them, their successors in office and their employees and attorneys, until further order of the Court, from taking any action in a Proceeding pending before the defendant Federal Trade Commission, entitled "In the Matter of The Procter & Gamble Company, a corporation, Docket No. 6901" (hereinafter referred to as "said Proceeding"), from ordering or holding any further hearings of any kind in said Proceeding, from taking any action pursuant to a

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Notice

certain order of remand entered in said Proceeding on June 15, 1961, and pursuant to an order made in said Proceeding by defendant Everett F. Haycraft dated November 6, 1961, and from taking any other acts or steps in said Proceeding except entering an order dismissing the complaint herein.

Yours, etc.

ROYALL, KOEGEL, HARRIS & CASKEY

By KENNETH C. ROYALL
KENNETH C. ROYALL

/s/ FREDERICK W. P. LORENZEN
FREDERICK W. P. LORENZEN

Members of the Firm

Office and P.O. Address
1730 K Street, N.W.
Washington 6, D.C.

DINSMORE, SHOHL, BARRETT, COATES
& DEUPREE

By RICHARD W. BARRETT
RICHARD W. BARRETT

Member of the Firm

Office and P.O. Address
Union Central Building
Cincinnati 2, Ohio

Attorneys for Plaintiff

November 24, 1961

NOTICE

To: Federal Trade Commission, Paul Rand Dixon, Sigurd Anderson, William C. Kern, Philip Elman, Everette MacIntyre and Everett F. Haycraft

PLEASE TAKE NOTICE that the points and authorities to be submitted in support of the foregoing

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Notice

motion are enclosed herewith. The rules of the above-entitled Court requires that if you oppose the granting of the above motion, you or your counsel shall within five days from the date of service of a copy of this motion upon you, or such further time as the said Court may grant, or, as the parties to this suit may agree upon, file in reply with the Clerk of said Court, a statement of the points and authorities upon which you reply, and serve a copy thereof upon counsel for the moving plaintiff.

ROYALL, KOEGEL, HARRIS & CASKEY

By KENNETH C. ROYALL
KENNETH C. ROYALL

and

/s/ FREDERICK W. P. LORENZEN
FREDERICK W. P. LORENZEN

Members of the Firm

Office and P.O. Address
1730 K Street, N.W.
Washington 6, D.C.

DINSMORE, SHOHL, BARRETT, COATES
& DEUPREE

By RICHARD W. BARRETT
RICHARD W. BARRETT

Member of the Firm

Office and P.O. Address
Union Central Building
Cincinnati 2, Ohio

Attorneys for Plaintiff

November 24, 1961.

Affidavit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3798-61

THE PROCTER & GAMBLE COMPANY, an Ohio corporation, having its principal office and place of business at 301 East Sixth Street, Cincinnati, Ohio,

Plaintiff,

v.

FEDERAL TRADE COMMISSION; PAUL RAND DIXON, SIGURD ANDERSON, WILLIAM C. KERN, PHILIP ELMAN, EVERETTE MacINTYRE, individually and as Commissioners of the Federal Trade Commission; and EVERETT F. HAYCRAFT, individually and as Hearing Examiner of the Federal Trade Commission, Pennsylvania Avenue at 6th Street, N. W., Washington, D. C.,

Defendants.

COUNTY OF HAMILTON }
STATE OF OHIO } ss.:

AFFIDAVIT

DEAN P. FITE, being duly sworn, deposes and says:

1. I reside at 7220 Winding Way, Cincinnati, Ohio. I am Vice-President—Corporate Affairs of plaintiff, The Procter & Gamble Company (hereinafter referred to as "Procter").

2. I attended hearings held in said Proceeding in Cincinnati, Ohio.

Affidavit

3. The preparations in connection with said Proceeding were handled by departments of the Company now under my general supervision and the individuals responsible for the preparation of said Proceeding report directly to me.

4. I am generally familiar with the matters alleged in the complaint herein and hereby state that, to the best of my knowledge, the factual allegations in such complaint are true.

5. With reference to the allegations in the complaint concerning irreparable injury if the present order of remand is not enjoined, I believe that the consequences alleged therein are true. I believe that the business of Procter will be disrupted in the manner alleged in the complaint if said Proceeding were to continue and it again became necessary to produce witnesses, to prepare statistical evidence, studies and surveys, to obtain market data information, to prepare for cross-examination, to consult economic experts and otherwise prepare for trial.

6. Illustrative of this disruption, during the course of the Proceeding, Mr. H. J. Morgens, Procter's President, was called to the witness stand on four separate occasions and spent a total of about three and a half days on the witness stand. This was in addition to the time necessary to acquaint himself with various details of company operation in preparation for his testimony. Similarly, Mr. B. F. Trimpe, Vice-President—Sales of Clorox, appeared on the witness stand on April 16 and 17, November 19, 20 and 26, 1958 and January 9, 1959. Some of the other key officials of Procter and Clorox who appeared, together with their titles and the dates on which they testified, are as follows: Mr. F. A. Brown,

Affidavit

General Manager of The Clorox Company on April 14, 1958; Mr. William Towers, Vice-President & Treasurer of The Clorox Company on April 14 and November 24, 1958; Mr. Neil Shaver, Advertising Manager of The Clorox Company, April 16 and 17, 1958; Mr. E. A. Snow, Procter's Vice-President—Advertising on July 7, 1958; and Mr. V. L. Montgomery, Vice-President—Manufacturing of The Clorox Company on November 17, 1958.

Unless the present order of remand is enjoined, the services of these same officers, or others holding positions of the same importance, will be required in future proceedings, thereby contributing to further disruption of Procter's business.

7. Furthermore, I believe that the uncertainties in the future conduct of Procter's activities in the liquid bleach industry, necessarily inherent in a continuation of said Proceedings, will result in detrimental consequences to Procter as alleged in the complaint. The uncertainty as to the future of Procter in the liquid bleach industry makes requisite long range planning almost impossible. The continued pendency of said Proceedings undermines the confidence of the employees of the acquired business and adversely affects Procter's relations with the public and with its customers.

8. Unless further proceedings in this matter are immediately enjoined, Procter will sustain irreparable injury for no part of which will it be able to obtain from any source even partial compensation.

9. The fact that defendant, Everett F. Haycraft, acting pursuant to the directive of the Federal Trade Commission, has set down said Proceedings for new hearings commencing November 30, 1961 requires that a temporary

Affidavit

restraining order and preliminary injunction issue. Otherwise, all of the harm and injury consequent upon the reopening of the evidence in this case would befall Procter even though the ultimate decision in this matter is in plaintiff's favor. All of the preparation, expense, adverse publicity and uncertainty in the business of Procter, referred to in the complaint hereinabove, would occur when new hearings are in fact held, irrespective of the ultimate outcome of such hearings. On the other hand, there is no indication that the defendants or Commission's Counsel will be harmed by loss of any evidence or in any other way if a temporary restraining order and preliminary injunction, as requested, be granted during the pendency of this litigation.

10. I am advised by the attorneys for Procter and I believe that the reopening of said Proceeding by the defendants, without the request of any party to said Proceeding and after the testimony has been closed and all Proceedings have been closed, results in undue harassment of Procter in violation of the statutes and rules relied upon in the complaint.

11. No prior application for the relief sought herein has been made to this or any other court.

/s/ DEAN P. FITE

Sworn to before me this 22nd day of November, 1961.

/s/ ROBERT J. WATKINS

Notary Public

My commission expires May 17, 1962.

[SEAL]

Motion for Temporary Restraining Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3798-61

THE PROCTER & GAMBLE COMPANY, an Ohio corporation, having its principal office and place of business at 301 East Sixth Street, Cincinnati, Ohio,

Plaintiff,

v.

FEDERAL TRADE COMMISSION; PAUL RAND DIXON, SIGURD ANDERSON, WILLIAM C. KERN, PHILIP ELMAN, EVERETTE MacINTYRE, individually and as Commissioners of the Federal Trade Commission; and EVERETT F. HAYCRAFT, individually and as Hearing Examiner of the Federal Trade Commission, Pennsylvania Avenue at 6th Street, N. W., Washington, D. C.,

Defendants.

MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff, by its attorneys, on the complaint and affidavit of Dean P. Fite, verified on November 22, 1961, and all filed herein, moves this Court to issue a temporary restraining order enjoining the defendants and each of them, their successors in office and their employees and attorneys, until further order of the Court, from taking any action in a proceeding pending before the defendant Federal Trade Commission, entitled "In the Matter of The Procter & Gamble Company, a corporation, Docket No. 6901"

Motion for Temporary Restraining Order

(hereinafter referred to as "said Proceeding"), from ordering or holding any further hearings of any kind in said Proceeding, from taking any action pursuant to a certain order of remand entered in said Proceeding on June 15, 1961 and pursuant to an order made in said Proceeding by defendant Everett F. Haycraft dated November 6, 1961, and from taking any other acts or steps in said Proceeding except entering an order dismissing the complaint herein.

Yours, etc.

ROYALL, KOEGEL, HARRIS & CASKEY

By KENNETH C. ROYALL
KENNETH C. ROYALL

and

/s/ FREDERICK W. P. LORENZEN
FREDERICK W. P. LORENZEN

Members of the Firm

Office and P.O. Address
1730 K Street, N.W.
Washington 6, D.C.

DINSMORE, SHOHL, BARRETT, COATES
& DEUPREE

By /s/ RICHARD W. BARRETT
RICHARD W. BARRETT

Member of the Firm

Office and P.O. Address
Union Central Building
Cincinnati 2, Ohio

Attorneys for Plaintiff

November 24, 1961

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Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3798-61

THE PROCTER & GAMBLE COMPANY, an Ohio corporation, having its principal office and place of business at 301 East Sixth Street, Cincinnati, Ohio,

Plaintiff,

v.

FEDERAL TRADE COMMISSION; PAUL RAND DIXON, SIGURD ANDERSON, WILLIAM C. KERN, PHILIP ELMAN, EVERETTE MacINTYRE, individually and as Commissioners of the Federal Trade Commission; and EVERETT F. HAYCRAFT, individually and as Hearing Examiner of the Federal Trade Commission, Pennsylvania Avenue at 6th Street, N. W., Washington, D. C.,

ORDER

Plaintiff's Motion for Temporary Restraining Order, coming on to be heard, and counsel representing all the defendants having stated that the only evidence which will be offered on behalf of the Federal Trade Commission in the proceeding before that Commission bearing Docket No. 6901 will consist (except to the extent necessary in rebuttal to any evidence hereafter introduced by plaintiff) of documentary evidence all of which has been shown to plaintiff's counsel today, and a witness to authenticate such documents; and further having stated that the introduction of such evidence will not consume more than two hearing days, December 1, 1961, and December 4, 1961.

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Praecipe

Wherefore, it is, on this 30th day of November, 1961,
ORDERED that the Motion for Temporary Restraining
Order is denied without prejudice.

/s/ JOSEPH C. MCGARRAGHY
United States District Judge

PRAECIPE

(Filed April 5, 1962)

HARRY M. HULL, *Clerk*

Civil Action No. 3798-61

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

the 5th day of April, 1962

THE PROCTER & GAMBLE COMPANY,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants.

The Clerk of said Court will please take notice that the
plaintiff voluntarily discontinues the above-entitled action
and voluntarily dismisses the complaint without prejudice.

ROYALL, KOEGEL, HARRIS & CASKEY

By /s/ **FREDERICK W. P. LORENZEN**
FREDERICK W. P. LORENZEN

**1730 K Street, N.W.,
Washington 6, D. C.**

Attorney for plaintiff

Transcript of Proceedings

(Tr. p. 1)

**BEFORE THE
FEDERAL TRADE COMMISSION**

**In the Matter of
THE PROCTER & GAMBLE COMPANY, a corporation.**

Docket No. 6901

**Courtroom No. 1,
Room 805,
United States Post Office and
Courthouse,
Cincinnati, Ohio
December 16, 1957**

Met, pursuant to notice, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

APPEARANCES:

**WILLIAM R. TINCHER; Attorney for the Federal Trade
Commission, and**

**THOMAS A. DEVENY, III; Attorney for the Federal Trade
Commission.**

**JOSEPH C. DINSMORE, Attorney for the Respondent; of
the firm of Dinsmore, Shohl, Dinsmore and Todd,
12th Floor, Union Central Building, Cincinnati, Ohio,
and**

**RICHARD W. TODD, Attorney for the Respondent; of the
firm of Dinsmore, Shohl, Dinsmore and Todd, 12th
Floor, Union Central Building, Cincinnati, Ohio, and**

(Tr. p. 2)

**KENNETH C. ROYALL, Attorney for the Respondent; of
the firm of Dwight, Royall, Harris, Koegel and Cas-
key, 100 Broadway, New York City, and**

Proceedings

ROBERT D. LARSEN, Attorney for the Respondent; 500
Wire Building, 1000 Vermont Avenue, N.W., Wash-
ington, D. C.

(Tr. p. 3)

PROCEEDINGS

Hearing Examiner Haycraft: This is the initial hear-
ing in Docket No. 6901, Federal Trade Commission pro-
ceeding re Procter & Gamble Corporation, convening in
Room 805 in U. S. Courthouse, Cincinnati, Ohio, at 10:00
o'clock a.m., on the 16th day of December 1957, before
Everett F. Haycraft, duly appointed and qualified Hear-
ing Examiner for the Federal Trade Commission.

* * * * *

(Tr. p. 9)

Hearing Examiner Haycraft: Well there is one point

(Tr. p. 10)

that I would like to have cleared up, I think perhaps in
the beginning. Referring now to the body of the motion
to limit or quash, I notice with respect to the documents
described in the subpoena, in Paragraphs 1 and 2, 3, and
3-A, 4, 5, the first five paragraphs of the detailed part of
the descriptive matter in the subpoena, that the point is
made that anything back of 1956, any documents back of
1956, would be irrelevant and immaterial to this proceed-
ing.

What do you have to say to that, Mr. Tincher?

Mr. Tincher: Well, Mr. Examiner, I believe in Section
7 proceedings it is essential for all purposes to have a more
or less a "before and after" look at the situation, in order
to see what the structure of the market, and of the ac-

Howard Joseph Morgens—Direct

quired and the acquirer was, prior to the acquisition, and if possible, to have a look after the acquisition.

* * * * *

(Tr. p. 13)

Mr. Tincher: Mr. Examiner, for the reason that this

(Tr. p. 14)

acquisition involved in this case is what the Commission started calling and I guess we lawyers have adopted the word, of a conglomerate acquisition, there has been no displacement horizontally of competitors of the same product.

* * * * *

(Tr. p. 33)

Mr. Royall: Well, your Honor, we are trying here only the Clorox merger.

Hearing Examiner Haycraft: Yes, but as I understand it, it is a unique proceeding. There has never been one like it before, Mr. Royall.

Mr. Royall: Yes, but—

Hearing Examiner Haycraft: It is a conglomerate. I don't know what the Courts are going to do with this thing; I don't know what the Commission, when they get all the facts, is going to do; I don't know what I am going to do—but I want the facts. I have to have the facts before I can determine whether or not it is a conglomerate acquisition; whether or not I believe it is that type of acquisition Congress had in mind when they passed this amendment to the Act.

* * * * *

(Tr. p. 69)

Howard Joseph Morgens,

was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Howard Joseph Morgens—Direct

Hearing Examiner Haycraft: What is your full name, please?

The Witness: Howard Joseph Morgens.

* * * * *

DIRECT EXAMINATION

By Hearing Examiner Haycraft:

Q. Well, state your position, if you will please. A. President of Procter & Gamble Company.

Q. How long have you been president? A. Since October 1st, this past year.

* * * * *

(Tr. p. 70)

Q. 1957? A. 1957.

* * * * *

(Tr. p. 71)

Q. Which of those divisions handles The Clorox Company? A. The Clorox Company is a subsidiary company of Procter & Gamble Company, and the General Manager of The Clorox Company now reports directly to me.

Q. Did you have direct charge of the acquisition of The Clorox Company? A. I did, under the then President of the company, yes.

Q. Did you conduct the negotiations? A. Yes, sir, I did. With help, of course—attorneys, accountants.

* * * * *

(Tr. p. 85)

Hearing Examiner Haycraft:

* * * * *

I think it's fairly clear from my rulings that I'm not going to allow at this time, unless the Commission tells me to, detailed information as to expenditures as you've

Howard Joseph Morgens—Direct

listed them here under 43 in products other than the liquid bleaches. And, also, following that same ruling, your surveys, and so on in 14.

I don't believe that there is any probative value—again I may be wrong, and I may be overruled—but I don't believe there is any probative value in attempting to show, or making a showing as to the expenditure of money in advertising products which have no relation whatever to the field in which they are entering in this case, for the simple reason that the amount of money that may be used in promoting or advertising one product may vary, and probably does vary, depending upon the competitive situation of that product, which would be different than the products we have involved in this case.

* * * * *

(Tr. p. 91)

Courtroom No. 1, Room 805,
United States Post Office and
Courthouse,
Cincinnati, Ohio

December 17, 1957

Met, pursuant to adjournment, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner:

* * * * *

(Tr. p. 217)

Courtroom No. 1, Room 805,
United States Post Office and
Courthouse,
Cincinnati, Ohio

December 18, 1957

Met, pursuant to adjournment, at 10:00 a.m.

*Proceedings***BEFORE:****EVERETT F. HAYCRAFT, Hearing Examiner.*** * * * *
(Tr. p. 219)**PROCEEDINGS*** * * * *
Mr. Tincher: Mr. Examiner, we have reserved Commission's Exhibits Number 1 and 2 for the annual statements of The Procter & Gamble Company for the years ending—the fiscal years ending in 1952, 1953, respectively. And here we

(Tr. p. 220)

have Commission's Exhibits for identification 3, 4, 5 and 6, which are respectively The Procter & Gamble annual statements for the fiscal years ending June 30, 1954, 1955, 1956 and 1957. And I would offer these four exhibits at this time.* * * * *
(Tr. p. 222)**(The papers referred to, heretofore marked for identification Commission's Exhibits 3, 4, 5 and 6, were received in evidence.)*** * * * *
(Tr. p. 229)**Hearing Examiner Haycraft:** All right, number 14.**Mr. Tincher:** Is a stock list for the New York Stock Exchange of the Procter & Gamble Company, dated August 20, 1956. It is a bound document, paginated, with an indication of a letter plus a page number.**Hearing Examiner Haycraft:** How many pages in the document?

Proceedings

Mr. Tincher: That is what I am trying to determine here, sir. It doesn't—it goes from Page 16,466 to 16—and I beg your pardon, sir, but I will have to strike that. That same number is on every page. It is not paginated, as I had thought.

Hearing Examiner Haycraft: The reporter can page it and tell us about how many pages there are.

As I understand, this is a document that was prepared and published by the Department of Stock List, New York Stock Exchange, a prospectus of the Procter & Gamble Company at the time of its acquisition of the Duncan Hines Institute—no, of the Hines Park Foods, Inc., and the Duncan Hines

(Tr. p. 230)

Institute in 1956, August of 1956.

Is there any showing that the statements contained in this document were furnished by the respondent, Procter & Gamble Company?

Mr. Tincher: Well, as I understand, sir, the document was prepared by the Procter & Gamble Company.

(The document referred to was marked Commission's Exhibit No. 14 for identification.)

* * * * *

(Tr. p. 233)

Mr. Tincher: Commission's Exhibit Number 12, for identification, is a bound document which may be described as the report, upon examination, of the financial statements of the Clorox Chemical Co. for the fiscal year ended June 30, 1957, by Certified Public Accountants.

Commission's Exhibit Number 13, for identification, exactly the same description except for the period for the month ended July 31, 1957.

Samuel Benedict—Direct

(The papers referred to were marked Commission's Exhibits 12 and 13 for identification.)

Mr. Tincher: I offer these documents at this time.

(Tr. p. 235)

Hearing Examiner Haycraft: Well, they will be received in evidence; Commission's Exhibits Number 12 and 13 as identified.

(Tr. p. 240)

Samuel Benedict

was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

Hearing Examiner Haycraft: Will you state your full name, Mr. Benedict?

The Witness: Samuel Benedict.

Hearing Examiner Haycraft: And where do you live?

The Witness: In Woodlawn, Ohio.

(Tr. p. 241)

Hearing Examiner Haycraft: And what is your occupation?

The Witness: I am Secretary of The Procter & Gamble Company, and many of its subsidiaries.

Hearing Examiner Haycraft: All right, go ahead.

By Mr. Larsen:

Q. Mr. Benedict, I show you Commission's Exhibit 14 for identification entitled Department of Stock List, New York Stock Exchange. Do you recognize that document?

A. Yes.

Q. Was that prepared by you, or under your supervision? A. That was prepared under my supervision.

Samuel Benedict—Direct,

It's an application for listing on the New York Stock Exchange.

* * * * *

Hearing Examiner Haycraft: I will receive in evidence at this time Commission's Exhibit No. 14 for identification.

* * * * *

Mr. Tincher: All right, sir. Mr. Examiner, at this

(Tr. p. 242)

time I'd like to offer Commission's Exhibit Number 17 for identification, which is a fiscal exhibit. It is a loose-leaf notebook with attached pages. It is divided into sections, paginated consecutively through the alphabet, Pages 1 to Page 94, plus a glossary and an index.

* * * * *

Hearing Examiner Haycraft: How is it described?

Mr. Tincher: Excuse me, sir. It's a Sales Manual, Toilet Goods Sales Department of The Procter & Gamble Company.

Hearing Examiner Haycraft: Does it have a date?

Mr. Tincher: Yes, sir, it does. June, 1957. It also has a stamped number, 0009.

* * * * *

(Tr. p. 243)

(The paper referred to, heretofore marked Commission's Exhibit 17 for identification, was received in evidence.)

* * * * *

(Tr. p. 244)

Mr. Tincher: Mr. Examiner, we offer Commission's Exhibit Number 18 for identification, the Sales Manager, Case Goods Sales Department, of The Procter & Gamble Company, dated June, 1955. It is my understanding that

Proceedings

this is the current volume in use, and it is a loose-leaf notebook, paginated pages 1 through 145, with an index following.

(The paper referred to was marked Commission's Exhibit 18 for identification.)

* * * * *

Mr. Larsen: No objection.

Hearing Examiner Haycraft: Commission's Exhibit 18 will be received in evidence.

* * * * *

(Tr. p. 252)

Mr. Tincher: All right, sir. Commission's Exhibit Number 21, for identification, is a permanently bound document entitled, "Chain, Supermarket, Retail Operation"; containing details on the attached sheets as well as illustrations of space on shelves, both proper and improper as designated therein.

And it is accompanied by a cover letter, which I do not believe is essential. I will offer it at this time and if either side objects, or if you object, sir, the covering letter is not particularly important to us.

* * * * *

(Tr. p. 253)

Hearing Examiner Haycraft: Then we will mark this the same way. The cover page—I mean, this separate sheet will be marked Commission's Exhibit Number 21-A, and the material inside will be marked Commission's Exhibit Number 21-B—and these seven pages, we will keep them fastened together.

Commission's Exhibits 21-A and 21-B will be received in evidence.

* * * * *

Proceedings

(Tr. p. 265)

Mr. Tincher: Commission's Exhibit Number 27, sir, is entitled AGREEMENT dated May 28, 1957, and at the end of said agreement is signed——

Excuse me just a second.

——this is a copy of the agreement, on page 15 thereof appears the signatures of officials of the Clorox Chemical Co. and The Procter & Gamble Company, and thereafter unpaginated is Exhibit A consisting of one page—no—Exhibit A consisting of sections which are lettered with Roman numerals I through XX, and Exhibit B.

(The paper referred to was marked Commission's Exhibit 27 for identification.)

(Tr. p. 266)

Hearing Examiner Haycraft: Commission's Exhibit 27 for identification will be received in evidence.

(Tr. p. 312)

Courtroom No. 1, Room 805,
United States Post Office and
Courthouse,
Cincinnati, Ohio
January 31, 1958

(Tr. p. 314)

PROCEEDINGS

(Tr. p. 333)

Mr. Tincher: And as Commission's Exhibit Number 84-A through F a one-piece folded document entitled THIS

Proceedings

IS A PROMOTION YOU CAN REALLY TIE IN WITH, dated 11/52, apparently having no identification number.

Hearing Examiner Haycraft: Does it have a commodity, a product?

Mr. Tinchér: Yes, sir. Concerning Camay and Ivory Snow, having identification number, sir, of 3471-GP.

(The papers referred to were marked Commission's

(Tr. p. 334)

Exhibit No. 84-A through F for identification.)

* * * *

(Tr. p. 349)

Mr. Tinchér: Mr. Reporter, will you please mark as Commission's Exhibit 111-A through I for identification documents concerning a Presidential parade contest, dated August, 1956, Number 4270GP.

Hearing Examiner Haycraft: What commodities?

Mr. Tinchér: Excuse, sir; Tide, Joy, Camay, Oxydol, Ivory Snow. That's all, I guess, sir.

(The documents referred to were marked Commission's Exhibits 111-A through I for identification.)

* * * *

(Tr. p. 350)

(The documents referred to, heretofore marked for identification Commission's Exhibit 111-A through I, were received in evidence.)

* * * *

(Tr. p. 353)

Mr. Royall: Your Honor, I want to make an objection

* * * *

But I also, in addition to that, want to object to any of them prior to the one of 1957, on the further ground that

Proceedings

we are not trying what Clorox did before the merger, and they have no relevancy of any kind in this matter.

I would like to say this, your Honor: These are really not in answer to the subpoena, because these, as I

(Tr. p. 354)

understand it, are gross sales, and they asked for net sales. These were the best we could get for them by looking at other folks records.

We did that in an effort to not be captious about what we produced, and to be helpful wherever we could do so, but we do make—that does not affect our objection, your Honor. The production of them was an effort to supply the request of the subpoena, and doesn't alter the fact that we think that at the most only the one of 1957 is competent, and that as a starting point from which other questions may be presented.

Mr. Tincer: Well, Mr. Examiner, that would be fine; those last few words hold the key to it, though. "As a starting point." That would be fine if we were trying this in 1965, but we are trying it in 1958. If we start in 1957 there is nothing to go forward from.

Of course it is our basic contention, as you undoubtedly have read in our reply brief, that a "before and after" picture is required, and this, of course, is before. It is more specific than that, sir. I think you are entitled to it just in abstract. In this particular case we allege the Clorox Chemical Co., the size it was, was steadily pulling away from the rest of the bleach competitors, and we allege that P & G was a size, in merchandizing and promotion and all that sort of thing, far in excess of Clorox Chemical Co.,

(Tr. p. 355)

and multiplied that diversity tremendously.

Proceedings

For that reason we feel it is pertinent to know what was happening before.

(Tr. p. 374)

Mr. Tincher: As Commission's Exhibit 153-A through G, a document which should be stapled, concerning Comet Cleanser, dated January, 1956, number 252-X.

(Tr. p. 375)

(The document referred to was marked Commission's Exhibit 153-A through G for identification.)

(The document referred to, heretofore marked Commission's Exhibit 153-A through G for identification, was received in evidence.)

(Tr. p. 396)

Mr. Tincher: Commission's Exhibit 214-A through D is a promotional piece for the product Clorox—

Mr. Tincher: It's my understanding, sir, that this

(Tr. p. 397)

document concerns a promotion in the spring of 1957.

(The papers referred to were marked Commission's Exhibits 214-A, B, C and D for identification.)

Hearing Examiner Haycraft: The objections to this exhibit are overruled, and Commission's Exhibit 214-A through D for identification is received in evidence.

507a

Proceedings

(Tr. p. 423)

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Mr. Tincer: Commission's Exhibit Number 279-A through O is entitled WHITE SAVER SALE featuring Oxydol, Camay, Ivory Bar Soap, Joy, Spic and Span, dated July, 1957, number 4711-GP.

(The papers referred to were marked Commission's Exhibits 279-A, B, C, D, E, F, G, H, I, J, K, L, M, N, and O for identification.)

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(The papers referred to, heretofore marked for identification Commission's Exhibits 279-A, B, C, D, E, F, G, H, I, J, K, L, M, N and O, were received in evidence.)

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(Tr. p. 439)

Courtroom No. 1, Room 805,
United States Post Office and
Courthouse.
Cincinnati, Ohio
February 3, 1958

Met, pursuant to adjournment, at 9:30 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

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(Tr. p. 441)

PROCEEDINGS

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(Tr. p. 448)

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Mr. Tincer: Mr. Reporter, would you please mark as Commission's Exhibit 321 for identification a document

Proceedings

entitled BRANDS OF WASHING PRODUCTS USED IN URBAN AND RURAL HOMES, dated April 22, 1957, signed Market Research Department, number 57141, a paginated document containing 27 pages.

(The paper referred to was marked Commission's

(Tr. p. 449)

Exhibit 321 for identification.)

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Mr. Tincher: As Commission's Exhibit Number 323 for identification a paginated document consisting of three pages, apparently a memorandum to M. P. Link, Jr., from E. A. Snow, subject matter Clorox Chemical Company, and I make the assumption.

(Tr. p. 450)

that is the heading of the memorandum. It's dated February 28, 1957, marked Confidential, signed on Page 3 by Mr. M. P. Link, Jr.

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(Tr. p. 451)

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Mr. Tincher: And as Commission's Exhibit Number 324 for identification a document stapled together consisting of four sheets which have been marked A, B, C and D, said document being clearly a memorandum from a T. M. Warrington to a Mr. E. A. Snow, the document is dated October 26, 1955, marked Confidential, and entitled, after a preliminary statement, BLEACH MARKET BACKGROUND, said memorandum apparently being a recommendation from the writer to the receiver concerning P. & G.'s entry into the liquid bleach market.

(Tr. p. 452)

Mr. Royall: Your Honor—

Howard Joseph Morgens—Direct

Hearing Examiner Haycraft: I take it these are—these memorandums were furnished you by the respondent. Is that right?

Mr. Tincher: Yes, sir, in answer to the subpoena.

Hearing Examiner Haycraft: Go ahead.

Mr. Royall: Your Honor, we request an accurate description and not his characterization of the document.

Hearing Examiner Haycraft: Well, there will be time enough for that when he offers it.

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Mr. Tincher: And as Commission's Exhibit Number 325 for identification a copy of a document having a bound cover, on the bound cover appearing the information NIELSEN FOOD INDEX BI-MONTHLY REPORT TO THE CLOROX COMPANY ON HOUSEHOLD BLEACHES, August 1, 1957, said binder is a loose-leaf binder for documents contained therein which we have paginated with an automatic paginater consecutively from Page 1 through 116.

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(Tr. p. 456)

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Howard Joseph Morgens

resumed the stand and testified further as follows:

DIRECT EXAMINATION

By Mr. Tincher:

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(Tr. p. 458)

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Q. Now, Mr. Morgens, the subsidiary formed by The Procter & Gamble Company subsequent to the acquisition

Howard Joseph Morgens—Direct

of Clorox Chemical was known as The Clorox Company?

A. Our subsidiary is known as The Clorox Company.

Q. And that subsidiary is a wholly owned subsidiary of P & G? A. That is correct.

Q. Mr. Morgens, who is the leading producer of soap and detergent products in the United States? A. If by leading you mean the largest producer, I think The Procter & Gamble Company is.

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(Tr. p. 461)

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Q. Now, the product Clorox, the liquid bleach, is also sold in

(Tr. p. 462A)

grocery stores and drug stores, is it not? A. The product Clorox is certainly sold in grocery stores. I don't think you would find it in very many drug stores.

Q. Excuse me. How about variety stores and department stores? A. I imagine you would find it in department stores. I am not sure about variety stores. It wouldn't be sold in very great quantity through any variety store.

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(Tr. p. 467)

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Q. Well, let's see. We have Nielsen surveys utilized by the P & G Company. I assume, then, that those Nielsen surveys deal with particular brands? A. They deal with brands, yes.

Q. And do they deal with types of detergents and soaps, for example heavy sudsing, heavy duty? A. By brands; you can break down, you can describe it by the different brands. We use Nielsen primarily in two broad

Howard Joseph Morgens—Direct

(Tr. p. 468)

categories. One is what we call household packaged soaps, and the other is toilet soaps, and those are the only two broad categories we think are significant.

Q. That was household packaged? A. Household packaged soaps, and toilet soaps.

Hearing Examiner Haycraft: What do you mean by packaged soaps?

The Witness: Any soap that is sold in a package as distinct from a toilet bar, like a cake of Camay or a cake of Lux Toilet Soap.

All of the laundry soaps and dishwashing soaps are usually sold in a carton, or a can, or a package.

Hearing Examiner Haycraft: Ivory Snow, for instance?

The Witness: Ivory Snow would be a package soap, yes, sir.

Toilet soaps are generally for personal use, face and hands and bath; packaged soaps are generally for household use.

(Tr. p. 469)

Q. Mr. Morgens, it is true, is it not, that the net worth, the net sales and the net profit of The Procter & Gamble Company has tripled since 1946, and if that is not true for all three categories, why of course you can so indicate.

A. Let me take the first part of your question.

No, it is not true, in my judgment, that the net profits, at least, have tripled since—What year did you say?

Q. Since 1946. A. I thought that was the year.

As far as net worth is concerned, I really don't know the figures, I couldn't tell them to you. I could find out, of course.

Howard Joseph Morgens—Direct

The Witness: Your Honor, I would like to elaborate on that question.

You have taken the year ending June 30, 1956. Your statement possibly could be true if you take that one year. That was a very abnormal year immediately at the end of the war,

(Tr. p. 470)

and I don't recall all the circumstances, but I am quite sure you would find that there were considerable shortages, there may have still been OPA regulations, and so on.

If you will take the following year, the year ending June 30, 1947, you will see that our business is up about one and a half times; and if you take a normal year, or an average of any year before World War II, you will find that our profits are up less than three times, since before the World War.

So, for your specific year you may be correct on a 300 per cent increase, but as a general statement, no, we have not tripled our profits since the end of World War II.

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(Tr. p. 477)

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By Mr. Tincher:

Q. Mr. Morgens, does The Procter & Gamble Company, or yourself, feel that there are any competitive products to household liquid bleach? A. We certainly do.

Q. And what are those products, sir? A. You mean competitive to our product?

Q. Competitive to the product Clorox. A. Well, there are about one hundred and—I guess there are over one hundred, there may be two hundred bleach companies

Howard Joseph Morgens—Direct

making household liquid bleach products. The leading one is Purex, Hilex—

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(Tr. p. 481)

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Q. Now, are there any other products competitive with Clorox, sir, other than the products of the designated number of liquid bleach manufacturers that you have named? A. There are powdered bleaches, which I would regard as competitive with Clorox.

Q. All right, sir. Anything else? A. Those are the only ones I am aware of.

Q. Now, for what reasons do you regard powdered bleaches as competitive with liquid bleaches? A. Because they compete with liquid bleaches for the same purpose.

Hearing Examiner Haycraft: What is the purpose?

The Witness: Bleaching clothes; disinfecting floors. There are a multitude of purposes for Clorox; disinfecting sinks, toilet bowls. The housewife uses it very broadly as a household disinfectant, as well as a product used for bleaching clothes in the washing process.

By Mr. Tinch:

Q. I take it, then, sir, when you state that they are

(Tr. p. 482)

competitive, you mean they are competitive for functional reasons, because of the functions performed by the two products? A. Yes, sir.

Q. You realize, of course, Mr. Morgens, that liquid bleach is only approximately 10 per cent of the sales volume—or, rather, dry bleach is only approximately 10 per cent of the sales volume of the liquid bleaches? A. I realize that. You were asking me to name competitors.

Howard Joseph Morgens—Direct

Q. Yes, sir, of course. Do you recognize—

Hearing Examiner Haycraft: Let me see if I see what you are leading up to here.

Is there an issue in this case, Mr. Tincher, and Mr. Royall, as to what constitutes the line of commerce involved, whether there is a difference between a liquid bleach market and a general bleach market?

Mr. Tincher: Well, now, that, sir, is exactly why I asked Mr. Morgens to explain what they meant by "practical" in their answer, because if it is the contention—

Hearing Examiner Haycraft: I don't think you should ask him that.

Mr. Tincher: I don't have to, now, sir. I went at it the long way, and found out. But if it is P & G's contention that dry bleach and liquid bleach are in the same line of commerce, I wanted to know, at this early date, rather than when

(Tr. p. 483)

in my rebuttal.

Hearing Examiner Haycraft: I am trying to clarify the issues a little here, if I can.

Mr. Royall: Your Honor, they have chosen the liquid bleach market as the market to try this case on. We have not proposed or suggested any alternative, but we have not admitted, and do not want to, until the facts are completely developed, whether or not it is a valid market.

Hearing Examiner Haycraft: All right, that's still an open question, then?

Mr. Royall: Well, sir, we haven't admitted it, and we have alleged no other market.

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By Mr. Tincher:

Q. Mr. Morgens, prior to its acquisition by P & G, you recognize that Clorox Chemical Co. was the largest pro-

Howard Joseph Morgens—Direct

ducer of household liquid bleaches, do you not, both in volume and in sales dollars? A. Correct.

Q. And did your surveys and researches indicate to you who was the second-largest producer? A. Purex.

Q. Did your surveys and researches and studies indicate to you any household liquid bleach producer which had over six per cent of that national market, with the exception of Clorox

(Tr. p. 484)

and Purex?

Mr. Royall: We object, your Honor.

Hearing Examiner Haycraft: Overruled.

A. I don't recall, really. There may have been one or two over six per cent; not much over, if that's helpful.

By Mr. Tincher:

Q. Does the Colgate-Palmolive-Peet Company manufacture and sell a household liquid bleach?

Mr. Royall: Objection. I don't know the materiality of that, at all, your Honor.

Hearing Examiner Haycraft: Well, I think it is general background for the market we are considering here. Objection overruled.

A. Colgate does not produce or market a liquid bleach.

By Mr. Tincher:

Q. And the same question, Mr. Morgens, with reference to Lever Bros.

Mr. Royall: Objection.

Hearing Examiner Haycraft: Overruled.

A. Not in this country.

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(Tr. p. 485)

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Howard Joseph Morgens—Direct

By Mr. Tincher:

Q. All right, now, Mr. Morgens, were there any assets or business of the Clorox Chemical Co. which was not acquired in the acquisition by P & G, as that acquisition was finally worked out? A. All of the assets were acquired in that exchange of stock for assets.

Q. And what was the effective date of the acquisition? A. August 1, 1957.

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Q. Have you made a computation of the value of the P & G stock which was exchanged for the Clorox stock? A. On the basis of the value of the P & G stock on the date on which the contract was signed—not the date on which the acquisition became effective—it was \$30,300,000 worth of P & G stock.

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(Tr. p. 486)

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Q. Was the final acquisition accomplished by exchanging 8½ shares of Clorox stock for each 10 shares of P & G?

Hearing Examiner Haycraft: How many shares?

Mr. Tincher: The other way around; I mean 8½ of P & G.

Hearing Examiner Haycraft: Eight and a half of what?

Mr. Tincher: Eight and a half shares of P & G stock for ten shares of Clorox stock.

A. That is correct.

Pardon me, just a moment. I misspoke myself. There was not an exchange of stock. We exchanged stock for assets.

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(Tr. p. 487)

Q. What happened, then, sir, to the stock of Clorox Chemical Co. when P & G took over that company? A.

Howard Joseph Morgens—Direct

The Clorox Chemical Co. remained in existence. It exchanged its assets for Procter & Gamble stocks. The Clorox Chemical Co. ended up with its primary assets being Procter & Gamble stock, which it then distributed, as I recall, to its own shareholders when it went out of business.

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Q. Who are the officers of The Clorox Company now, sir?

A. I am President of The Clorox Company; Fred Brown is Executive Vice-President of The Clorox Company; there are a number of Vice-Presidents. One is a man named Trimpe who is Vice-President in charge of Sales; one is a man named Matson, who is Vice-President in charge of Traffic; one is a man named Montgomery, who is Vice-President in charge of Production.

Q. Were these gentlemen all with The Procter & Gamble Company

(Tr. p. 488)

prior to the acquisition? A. No, none of them were except for myself and Mr. Fred Brown.

Q. How about Mr. Trimpe? A. Mr. Trimpe was with the old Clorox Chemical Co. as Vice-President in charge of Sales of that company. He is currently Vice-President in charge of Sales of The Clorox Company which is our subsidiary.

Q. Who handled the advertising promotions for The Clorox Company? A. The Advertising Manager, a man who was Advertising Manager for the old Clorox Chemical Co. He is now advertising Manager for The Clorox Company, our subsidiary, and he works with a San Francisco advertising agency, which is the same agency which the Clorox Chemical Co. used.

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Howard Joseph Morgens—Direct

(Tr. p. 489)

Q. I would like to refer you to Paragraph 10 of the complaint. A. Of the complaint or the answer?

Q. Of the complaint, sir.

You will notice there are listed various plants as being production points of the Clorox Chemical Co. prior to the acquisition. Paragraph 10 of your answer omits this. Let me ask you if there are any plants, or if there were any other plants for production utilized by Clorox Chemical Co. in addition to those listed there? A. No, there were not.

Q. Now, subsequent to the acquisition have there been any new production plants located? A. No, there have not.

Q. And are all of those plants being used at the present time as set forth in Paragraph 10? A. No, all of these plants are not being used.

Q. And which ones are not, sir? A. The one in Seattle, Washington is not being used because we did not acquire it. That was sold by the old Clorox Chemical Co. prior to our acquisition.

The one in Kansas City we are not using, and have not used since the acquisition.

The one in Boston we are not using, and have not used since the acquisition.

Q. The latter two in Boston and Kansas City were acquired by

(Tr. p. 490)

the company. Is that correct? A. That is correct.

Q. Will you tell us, sir, why they were not, or why they are not being used to produce liquid bleach? A. The one in Kansas—

Howard Joseph Morgens—Direct

There were a number of reasons and considerations, obviously, that went into arriving at a decision of that kind. In Kansas City we happened to have a vacant building on our present plant site, and we are in the process of moving the Clorox operation into that vacant building.

And Boston, the Boston plant was originally located by the Clorox Chemical Co. with a view of making sales into eastern Canada, which sales had not developed, and in looking at it we decided we should not continue the operation of that plant.

Those, as I recall, were the main considerations.

Q. Now, when you say Kansas City is being put in with one of P & G's plants, is that a plant for producing soaps and detergent products?

A. It's being put in a building adjacent to and on the same property as the plant producing soap and detergents. The Clorox plant on that property, however, will be managed, when it is opened, by The Clorox Company, and the management of the plant, in other words, will head up to the San Francisco subsidiary, and not to the part of the business which runs the soap plant.

(Tr. p. 491)

Q. I see. Now, do I take it that the Boston production plant for the Clorox Chemical Co. was concerned only with sales in eastern Canada, or did they also sell domestically?

A. It also sold domestically.

Q. Now, where is the liquid bleach coming from for the area of the United States which was formerly served by the Boston plant of Clorox Chemical Co.?

A. It's coming from a plant in New Jersey, I believe. Certainly a good part of it is coming from the Jersey City plant.

Q. Do you have the United States allocated into sales areas, or regions, or by each production plant?

A. We

Howard Joseph Morgens—Direct

have what you might call four Sales Divisions of The Clorox Company with a man in charge of Sales in each Division. Those Divisions pretty well cover the United States.

Q. And could you tell us, sir, what the—of course, this would just be approximate—but what the approximate geographical boundaries of these four Sales Divisions are? A. I'd have a difficult time telling you that. I'm not close enough to really describe those boundaries. One is east, I would assume, one is south, one is in the west, and one is on the Pacific Coast.

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(Tr. p. 492)

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Q. Mr. Morgens, returning to the general subject matter of Clorox liquid bleach, Clorox liquid bleach is about 94¾% water, is it not? By that, what I mean is that Clorox liquid bleach is a product commonly known as a 5¼% sodium hyperchloride solution? A. That is a correct statement. 5.25% hyperchlorite solution, sodium hyperchlorite solution.

Q. And that is true, is it not, of most of the household liquid bleaches? A. That's what their labels say.

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(Tr. p. 493)

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Q. Now, prior to the acquisition did the Clorox Chemical Co. produce any product other than Clorox liquid bleach? A. The answer is 99% no. It produced an industrial bleach as a very small part of its business and which it sold in Oakland, California. It did not sell beyond the Bay area, at least.

Q. And that was—

Howard Joseph Morgens—Direct

(Tr. p. 494)

A. For all practical purposes it had only one product, and that was Clorox household bleach.

Q. And this bleach that you speak of as being industrial, that was a 16% concentrate, was it not? A. I'm not familiar with the figure. It was a very small part of their business, and one which we weren't particularly interested in.

Q. Has that business been continued by The Clorox Company? A. I am not certain. I—There certainly is no desire to expand it.

And as I say, it was a very small part of their business.

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(Tr. p. 495)

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Q. But at least it has been determined, whether reduced to paper or not, that each production plant will sell, assuming the supply, inventory is normal, will sell within a certain geographical area surrounding that plant. A. Yes, we sell everywhere in the United States. There isn't anyone that wants to buy household bleach that we won't sell. When the sale is made there are a lot of factors that go into consideration as to what plant should ship to that particular customer at that particular time. And generally speaking it will be mostly from the same plant. But there are border areas—

(Tr. p. 496)

Hearing Examiner Haycraft: Who determines that?

The Witness: The Manager of Traffic.

Hearing Examiner Haycraft: In San Francisco?

The Witness: In San Francisco. And truckers' rates vary. Sometimes a trucker will have—the rates vary

Howard Joseph Morgens—Direct

from time to time. I can't give you any precise answer on that. I don't think there is a hard line on a map to look at, if that's what you mean.

By Mr. Tincher:

Q. Well, one of the most important considerations in deciding which production plant to use, sir, is the fact that the value of the product in relation to the freight costs is extremely low, is it not?

Mr. Royall: Objection. That calls for a rather long analysis. That is not a question of fact.

Hearing Examiner Haycraft: Overruled. The witness can answer.

A. Let me put it this way: The freight costs on Clorox bleach are high. You pay a lot for shipping glass and water. It's a heavy material, and it's a breakable material. The freight costs tend to be high as measured by other—I'll say they tend to be high in relation to the total cost of the product as compared to most other grocery or household products with which I am familiar.

By Mr. Tincher:

(Tr. p. 497).

Q. Yes, sir. And that is the basic reason, is it not, why the Clorox Company and the Clorox Chemical Co. as well had production plants scattered all over the United States rather than attempting to serve the United States from one or even two or three plants? A. That is the basic reason why any company that is going to sell probably over the United States needs more than one plant.

Q. Now, at the time of the acquisition by P & G, Clorox bleach was firmly established as a reputable and well-known product, was it not? A. Well, there are different ways to interpret "firmly established"; If you mean

Howard Joseph Morgens—Direct

that it had a large sale at the time we acquired it to the public, the answer is yes.

Hearing Examiner Haycraft: I think it would mean, also, something about distribution.

The Witness: Yes. We had wide distribution on Clorox.

By Mr. Tincher:

Q. And it was known as a very well known product and very well received, was it not? A. Yes, I would say it was.

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(Tr. p. 498)

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Q. Mr. Morgens, at the time The P & G Company took over the assets of the Clorox Chemical Co. that company had a very substantial amount of retained cash earnings, did it not? A. It had a fairly substantial amount of retained cash earnings, yes.

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(Tr. p. 499)

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Hearing Examiner Haycraft: Was that your understanding of the phrase when the question was asked?

The Witness: I understood you to mean there was some cash in the Clorox Chemical Co. which we acquired which was over and above the cash required for the needs of the business.

Hearing Examiner Haycraft: Over and above the capital—Over and above the amount of the capital which they needed.

Mr. Tincher: Has your question been answered satisfactorily, sir?

Hearing Examiner Haycraft: Yes.

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Howard Joseph Morgens—Direct

(Tr. p. 500)

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By Mr. Tinchler:

Q. Mr. Morgens, can you tell us approximately what percentage of the product Clorox is sold in grocery stores?

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(Tr. p. 501)

A. I can't tell you that out of any knowledge. We sell—The Clorox Company sells to distributors. The distributors sell to whomever wants to buy bleach from them.

Hearing Examiner Haycraft: You mean Clorox doesn't sell direct to the retail trade?

The Witness: No, it does not.

By Mr. Tinchler:

Q. And what type of distributors are these, sir? A. I don't know quite what you mean.

Hearing Examiner Haycraft: Jobbers? Wholesalers?

The Witness: No, they are—

Hearing Examiner Haycraft: Brokers?

The Witness: You might call them equivalent to a food broker in another field, but they act as principal for us. We sell them the Clorox. We bill them for it. They own it. And they then, in turn, sell it to jobbers, to retailers.

By Mr. Tinchler:

Q. My point being—

Hearing Examiner Haycraft: Chain store retailers?

The Witness: I mean even chain store retailers. The Clorox Company only sells to distributors who act as principal, and they in turn distribute the merchandise to chains, independent retailers, jobbers, whatever, whoever wants to buy the product, whoever they can persuade to buy it.

Hearing Examiner Haycraft: Then does The Clorox

Howard Joseph Morgens—Direct

(Tr. p. 502)

Company distribute direct from the factory to the customers of these distributors?

The Witness: They do both. Most of the merchandise moves direct on the order of the principal, or what we call the distributor.

Hearing Examiner Haycraft: Go ahead, Mr. Tincher.

By Mr. Tincher:

Q. These distributors, there are approximately 80 in number, are there not, sir? A. Approximately. I think there are a few more than that.

Q. And they are basically what is known as food distributors. Is that not true? Or food brokers?

Hearing Examiner Haycraft: They can't be a broker.

A. They are a distributor of products which move through grocery stores in the main, sir.

Q. In the main. A. Yes.

Q. Now, Mr. Morgens, is it not correct that most of the grocery store products sold by The Procter & Gamble Company, including Clorox, are known as low cost and many repeat items? In other words, they are sold for low cost, and they are items that are used over and over again during the period of a year by the housewife? A. That

would be a characteristic of most of our household products. We make other products than what we call household

(Tr. p. 503)

products.

Q. Right. I'm limiting myself to grocery store products.

Hearing Examiner Haycraft: Now, is the term "household products" and "grocery store products" synonymous? Is that true of all your grocery store products?

Howard Joseph Morgens—Direct

The Witness: No, sir. There are household products that would move through drug stores. By household products I mean products which are used in the home rather than used by industry.

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By Mr. Tinch:

Q. Now, Mr. Morgens, P & G's basic competitive objective with Clorox, as with other products, is to retain customers already using those products, and to cause customers not using the product to switch to the product. Isn't that correct? A. Our basic objective is to sell Clorox, and the technique of how you do that is very difficult to describe. For example, I believe this is true of Clorol. I know it is true of our other household products. There is no such thing as what you call a steady customer. We haven't found—there must be some, but we don't find them in our surveys. The housewife is constantly shifting from one product to another. So I can't answer your question yes or no.

(Tr. p. 504)

By Mr. Tinch:

Q. And she will shift, will she, sir, to wherever she can get the best deal? A. She will shift in accordance with her own desires of what she wants to do, and sometimes it is price and sometimes it is quality, and sometimes it is impulse purchase. There's just a whole group of reasons for her shifting.

Hearing Examiner Haycraft: What will she shift from in buying Clorox? In other words, where would she go, what other products would she find on the shelf in the grocery store that would take the place of Clorox?

The Witness: I don't know of any grocery store, your Honor, that doesn't have many different household

Howard Joseph Morgens—Direct

bleaches on the shelves, some selling at a lower price, some selling at a higher price. There is a whole—It is so easy for her to shift, it is readily understandable why she does shift so often.

Hearing Examiner Haycraft: Well, you say often, how would—if that's true, how would Clorox maintain its position, then, in the industry?

The Witness: Clorox sells the quantity that it does because most often the housewife reaches for the bleach with the Clorox label on it, rather than a bleach with some other label on it, and the art of manufacturing and selling a product is to manufacture the quality of the product and to

(Tr. p. 505)

persuade the woman that that is the quality she wants most often. But there is what we call an ever-changing customer, she's constantly trying other products. And she comes back to Clorox most often, and that's the reason why it sells in greater quantity than its next competitor when you consider the country as a whole.

Hearing Examiner Haycraft: Go ahead, Mr. Tincher.

By Mr. Tincher:

Q. I believe you listed more or less two criteria there, sir: it has to be quality, and the housewife has to know about it. Do I do justice to what you say, in the way of summary? A. It is very easy to oversimplify these reactions of a housewife, and what causes her to buy. It is in the realm of psychology, and I don't think anyone fully understands it, including ourselves; but certainly quality of the product, and calling attention of the housewife to that quality, are two important factors in that process.

Howard Joseph Morgens—Direct

Q. And the product with the best quality, say the undisputed best quality, will not move, and will not be accepted by the housewife unless it is promoted and advertised, will it? A. I would like to make two statements in response to that question.

Quality is the primary requirement. You can't sell

(Tr. p. 506)

anything without quality, no matter how well you advertise it.

Hearing Examiner Haycraft: That is, you can't maintain a sale over any long period.

The Witness: You can sell it once, but you can't get the housewife to come back to purchase it.

A. (Continued) So we rate quality of product as the Number One requirement in any successful sale.

Hearing Examiner Haycraft: Can you illustrate, from your experience, a commodity that has been highly advertised, and it didn't hold up, and it failed on the market?

The Witness: Yes, we certainly can.

I would like to say it is not only quality, but it is, as you might define it in a laboratory—but it is quality as the——

Hearing Examiner Haycraft: As the public——

The Witness: As the public thinks of it.

Hearing Examiner Haycraft: In other words, public acceptance is the real test, isn't it?

The Witness: That's the real test. The housewife has her own ideas of quality and a good deal of the problem is to determine what she wants, and how she uses that product, and how she determines and measures quality in her own mind.

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Howard Joseph Morgens—Direct

(Tr. p. 508)

By Mr. Tincher:

Q. Mr. Morgens, the Procter & Gamble Company prides itself, and has for many years, on the quality of its products, does it not? A. We certainly do.

Q. And the same can be said for its new product Clorox, can it not, that it is a quality product? A. We believe that it is a quality product.

Q. And your surveys and investigations prior to the acquisition shows that Clorox was recognized and accepted as a quality product, did it not?

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A. We believe the public has a high opinion of Clorox, based on the quality that they have received over the years.

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(Tr. p. 509)

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The Witness: Well, it is also the fact that I think there is a concept in your mind, Mr. Tincher, that we have people who are steady customers of Clorox and only Clorox.

Hearing Examiner Haycraft: Well, I think that is a fair assumption. What is wrong with it?

The Witness: Well, I was trying to explain, we don't believe that. We don't know enough about Clorox, because we haven't had enough time.

Hearing Examiner Haycraft: That is possible. It may be.

The Witness: But I will say, if you draw your analogy from other parts of our products, a good customer of one of our other products would be one who uses it, say, 60 per cent of the time. If that is what you mean by a customer. The other times she's sampling other products.

Howard Joseph Morgens—Direct

Hearing Examiner Haycraft: Well, she will sample, then, of course. Now, we are getting into another field entirely, and I don't want to spend too much time on it. I

(Tr. p. 510)

don't know how much Mr. Tincher wanted to go into it. But one time she will probably sample another product, and that's when she can't find Clorox on the shelf?

The Witness: That's right, and that frequently happens.

Hearing Examiner Haycraft: Another factor is that Clorox is away out of line in price, might be. I can't see much of any other reason.

The Witness: Well, as I say, I don't know all the reasons in a housewife's mind, but sometimes she's just contrary and wants to try something different. She sees another brand and would like to try it, and she does that all the time, for one reason or another, that seem like good reasons to her; and that's as far as I can take it.

Hearing Examiner Haycraft: I just went through the trial of another industry, and of course you can't compare industries, I suppose, except you have the same housewives.

The Witness: Well, I bring this up: I think we may be off on a theoretical discussion which I don't want to pursue any further than you would like to, but you have asked twice now the question, Is one of our objectives to hold our customers? Well, we never have a complete hold on a customer.

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(Tr. p. 511)

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Q. What method is employed by P & G to determine if products are getting what the P & G Company thinks is an

Howard Joseph Morgens—Direct

(Tr. p. 512)

appropriate amount of shelf space?

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The Witness: Well, the job of a salesman is, in part, to see that the products he sells get what you call an appropriate amount of shelf space.

▶ Hearing Examiner Haycraft: In the retail store?

The Witness: In the retail store.

By and large the company's measure, in checking up on salesmen to see if they are doing the proper job, is to see if we—is to measure the performance, let's say, in relation to an objective, and the objective is to have our products have shelf space in proportion to the way those products move out of that particular outlet.

By Mr. Tincher:

Q. And how do you know how they move out of the outlet, sir? Your own products, of course it is obvious, but your competitors?

(Tr. p. 513)

products are considered also. A. Well, the retail buyer, retail store, will frequently make such figures available, and frequently will not, I might say, and that's why it is very difficult to check up. But, insofar as we can make a judgment as to how the products move relative to one another, we try to get our share of that shelf space in terms, in relation to movement of those products to the public.

Q. And in that connection the salesmen are supplied, and their sales organizers, with various promotional pieces which show the percent of the market that the P & G product enjoys, in order that they can show that to retailers and try to convince them of how much shelf space P & G should have, are they not? A. Oh, I wouldn't be

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surprised, but I don't know. I haven't seen that kind of information.

I would like to say that in aiming for our share of the available shelf space we set that as our goal, but the goal is practically never reached. It is just how far a given salesman advances toward that goal that we measure his performance relative to how far another salesman advances toward that goal.

Hearing Examiner Haycraft: Do you find, on the part of the retail dealers, a resistance to the use of shelf space if the product is not moving?

(Tr. p. 514)

The Witness: Yes, yes, that's correct; but a small-moving brand, your Honor, always has more shelf space than its movement deserves. That's almost an axiom of the business; just because, in order to have any representation at all on the shelf it needs, it usually needs more than is justified. A chain store, for example, will not keep an unopened case of merchandise in the back room, because—well, because of thievery, and the difficulty of keeping track of the merchandise. So it puts a whole case of a slow-moving brand on a shelf and it puts a whole case of some other brand that moves much more rapidly, on the shelf. That is the tendency. In order to make room for all of the brands which some housewives might want, the slow-moving brands usually have a disproportionate share of the available shelf space.

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(Tr. p. 518-B)

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Q. Mr. Morgens, in reality when you consider the grocery trade business as it exists today, in reality what P & G and other soap manufacturers, Clorox and other bleach

Howard Joseph Morgens—Direct

manufacturers are competing for is shelf space, is it not?

A. That's one of the things that they compete for, yes.

Q. And if they don't have the adequate, or even the appropriate amount of shelf space in relation to their sales, it's a competitive disadvantage to them. A. That is correct.

Q. Isn't it, also, a fact, Mr. Morgens, that many grocery stores, especially the larger super markets and chains, today are handling many more thousands of products than they used to in the past, and that's one reason why shelf space is such a problem? A. They're handling more products than they used to in the past. I don't know whether you can measure it in thousands or not.

Q. And this is a factor, also, is it not, sir, that makes it

(Tr. p. 519)

more difficult for a brand new product to break in? A. That's one of the factors that make it difficult for a brand new product to get shelf space.

Q. And is this not one of the basic reasons when P & G breaks in a new product it doesn't just put it on grocery shelves, or try to, but the introduction is accompanied by either a large advertising campaign and the grocers are notified of the advertising campaign will be forthcoming?

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A. I would like to say one of the reasons we notify or inform our salesmen an advertising campaign is forthcoming, but we don't run advertising or promotion to get distribution. We run that type of activity to sell to the consumer. That's our basic reason for it.

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(Tr. p. 522)

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Howard Joseph Morgens—Direct

By Mr. Tinch:

Q. All right, sir. Now, returning to the shelf space topic, it is true, is it not, Mr. Morgens, that even within a given section of shelf space, say the space reserved for soaps and detergents, that even within that area there are shelves that are more desirable and produce better selling results than other shelves within that same area? A. There are.

Q. And one of the objectives of P & G is to obtain that type of shelf space, as well as an appropriate amount of shelf space. A. We would like to obtain the best shelf space in the world for our products, obviously.

Q. And once again, the contention of P & G is that most desirable type of shelf space should go to the products having the appropriate volume. A. I understand that is determined by the trade, not by us.

Q. That is right. A. And there are a lot of different ideas about what is the most desirable shelf space, a lot of different opinions within a company such as ours about what is the most desirable shelf space. Eye level position is considered one, except the eye level shelves frequently don't hold enough merchandise, and if you try to put a product like Tide on the eye level shelf you would soon run out of your product, you would run out every few

(Tr. p. 523)

minutes. So we don't go after that.

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Q. As a matter of fact the shortage of inventory of Clorox was one thing that P & G had brought to its attention by various sources prior to buying the Clorox Chemical Co., is that not correct? A. We were aware of the shortage of available supplies on grocery store shelves,

Howard Joseph Morgens—Direct

yes, of Clorox. We are quite familiar with that problem because we face it on our own products.

Q. And that's a problem that The P & G Company will attempt to correct with Clorox, will it not? A. We constantly attempt to correct it, not only for Clorox but for all of our other products. We never, as I say, quite succeed.

Q. And that is another reason for obtaining a sufficient amount of shelf space, is it not, because it is much better to have the product; if you're going to sell the grocer, for example, two cases, isn't it better for him to have both cases on the shelf than one case on the shelf and one case back in his

(Tr. p. 524)

stockroom? A. It's desirable from our company's standpoint, we think from the trade standpoint, and we think from the consumer's standpoint to have merchandise on the shelf in relation to the public acceptance . . . I'll use your Honor's phrase . . . of that product. Otherwise you find bare shelves, the product runs out, the stockboys never quite keep up with the demand, and you lose a lot of business, and the consumer loses in the sense that she doesn't find the product available that she wants to buy.

(Tr. p. 529)

Q. Is there any single P & G product in the case goods department, and by the way would you explain for us on the record what the case goods department or division is, sir? A. Case goods merely refers to products which are sold in cases. In other words, household products as distinct from industrial products.

Q. That would include the soaps, detergents, cleansers, shortenings? A. We speak now, really, of case soap

Howard Joseph Morgens—Direct

products, or case food products rather than just case goods. But put them all together and they are called case goods.

Q. All right, sir. Is there any product in the case goods division or in the toilet goods division which is not advertised by P & G?

A. Yes, there are products in the case soap division. As I say, I have to distinguish the case soap division, which are not advertised by Procter & Gamble.

Q. Are those products being sold nationally? A. Yes. Since every salesman is authorized to sell them—

Hearing Examiner Haycraft: What are those products? I thought you advertised everything.

The Witness: Not everything. Almost everything. In the case soap business we have—where I referred to the bar laundry soaps earlier in my testimony this morning.

Hearing Examiner Haycraft: You don't sell much of

(Tr. p. 530)

that?

The Witness: We don't sell much, but we don't advertise it.

Hearing Examiner Haycraft: There's not much of a market for that, is there?

The Witness: We sell a hard water soap called Kirk's Castile.

Hearing Examiner Haycraft: A hand soap.

The Witness: A hand soap. It is not advertised. But a major part of our case soap business is all advertised brands.

Hearing Examiner Haycraft: And I suppose it would follow that you advertise, naturally, where you have a market, naturally, where everybody, or every housewife all over the United States is a customer.

The Witness: Where there's a market, an opportunity.

Hearing Examiner Haycraft: And the reason you don't advertise, is where there's a limited market.

Howard Joseph Morgens—Direct

The Witness: Where there's a limited market, that's right.

(Tr. p. 531)

By Mr. Tincher:

Q. Can you tell us, Mr. Morgens, the total amount of money expended for advertising in the year 1957? And may I, for you, sir—I am not trying to be tricky about it—the complaint alleges \$79,000,000. The answer admits at least that much was spent. I am asking you because I have reason to believe that the figure is larger. A. Well, I am not going to be tricky about it either, in my answer, but I will tell you the honest answer is that I just don't know, and I think that probably requires some explanation.

We never see an overall figure in the management of The Procter & Gamble Company. I haven't seen one in years.

I think—I don't think any other major executive knows that figure, or has occasion to run into it. We don't use it in the management of our business, in any way.

Proposals and recommendations for advertising expenditures are submitted by brands, and they are approved by brands. They have meaning only in relation to an individual brand. The total has absolutely no meaning at all to us except that it just happens to be the sum of the various parts, and it has no use. That's one reason why we don't use it in any way in the management of the company, and I don't happen to know it.

(Tr. p. 534)

Mr. Tincher: That is correct, sir; and may I say I have in my list of questions—I think it would be advisable to do it all here now, at once:

Howard Joseph Morgens—Direct

We would also like to have—and certainly we think it is a concrete manifestation of what P & G can do with a new product, we would like to have the amounts expended on advertising and promotions of the products Gleem, Crest, and Comet, since their introduction.

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(Tr. p. 535)

Mr. Royall:

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(Tr. p. 536)
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We hope your Honor will not request this information, and in case of promotion that is particularly true. To give that information, with the knowledge that people generally have, competitors generally have, would enable an analysis

(Tr. p. 537)

of the methods of promotion, the results of it, and the way in which it is distributed between various brands.

I hope your Honor will not require the production of any of the information we have discussed, either generally or specifically, between promotion and advertising, and certainly not as to any specific product.

Mr. Tincher: Mr. Examiner, I would like to be heard briefly. In the first place, we have no knowledge on this record of what is required for a complete type of merchandising and promotional campaign in liquid bleach. We have absolutely nothing. We don't know. The fact that Clorox has, or had the money, and didn't do it, is well accepted, of course. But the fact that Clorox had some money didn't mean it could be used for advertising, any more than I can maintain because P & G, as the record

Howard Joseph Morgens—Direct

now shows, has several hundred millions of dollars of money stacked away in various places, doesn't mean that that several hundred million dollars can be used for advertising.

Hearing Examiner Haycraft: Why not?

Mr. Tincher: Because I think that anybody would agree that that is—anybody who is in business would agree that a certain sound financial basis has to be maintained, certain contingent funds have to be set aside, so—and certain reserve funds have to be set aside, certain provisions have to be made for taxes that might be in arrears or being

(Tr. p. 538)

contested. There are all kinds of possibilities, sir. It is just sound management, as I understand it, to have accumulated earnings, and to have reserves in the event of a recession, or something of that nature.

But, as I say, even if we could assume that all these vast reserves of either Clorox or P & G could be used for advertising, we have nothing on the record as to what it does cost. That's what we are trying to find out. We can look at Comet, Gleem, and Crest and find out what it costs; and my contention is that the cash assets possessed by Clorox Chemical Co. at the time of its dissolution will be minor and minute compared to the amounts expended on Comet, Crest, and Gleem.

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(Tr. p. 540)

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Hearing Examiner Haycraft: Of course there is pending an appeal from a motion on the quashing of the subpoena, but—and whatever action the Commission takes on appeal may have some bearing on future rulings. I am

Howard Joseph Morgens—Direct

going to follow along, however, the general theory that I have up to this time, until, or unless I am compelled to do otherwise, or unless I see further light.

I can see where the overall picture of the amount of money that Procter & Gamble was able to spend, and its policy of merchandising has seen fit to spend, generally, as an overall thing, would be relevant; and I think it would have some probative value.

As to the amount that was spent on any given item, new or old, while it might be relevant, in my judgment it would have no probative value, as I explained the last time we were here.

When Procter & Gamble goes into any industry or field, market, to sell its products, it is met with varying competitive conditions, and we can't assume that Procter & Gamble would necessarily have to spend the same amount of money, or any given amount of money, in order to sell Crest, for instance, or some other item, in another industry, other than the bleach industry.

(Tr. p. 541)

It not having been in the bleach industry before, you can't tell what the competitive situation is there, from their own records, from their own experience. We cannot, it seems to me, measure the amount of money that Procter & Gamble should be required to spend; or should spend, in the liquid bleach industry, by what it may have spent in a detergent industry, or some other industry.

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I don't think that we can determine conditions, what is necessary for Procter & Gamble to do in the liquid cleanser industry, by what they may have done in the other industry, because of the varying competitive conditions that may exist.

Howard Joseph Morgens—Direct

If I may illustrate that, suppose, for the sake of example, and there is some evidence along that line in the liquid bleach industry, the Clorox brand is a brand well known, whereas some of the other things that Procter & Gamble went into, the mix industry, for instance, which is a highly competitive industry, and the company they bought out there occupied a very small portion of the business relative to the two larger ones, and I would expect that Procter &

(Tr. p. 542)

Gamble would spend a lot more money in getting into that industry and getting shelf space in that industry, than it would in Clorox, which was an established brand with a very high reputation.

Mr. Royall: And that would be true in a new product entirely, too, your Honor.

Mr. Tincher: That is certainly true, sir.

Hearing Examiner Haycraft: For that very reason, Mr. Tincher, I just can't agree with your concept of the probative value of this type of comparison, because you do have this differing competitive background.

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Now, with that background, that explanation, and following my feeling up to the present time, I am going to ask the witness to accumulate an overall figure of what he spent, what the Company has spent on advertising in '56 and '57, and promotional, on all of its products; in other words,

(Tr. p. 543)

to see what that figure would bring out as to the ability of Procter & Gamble.

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Howard Joseph Morgens—Voir Dire, Direct

(Tr. p. 547)

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EXAMINATION ON VOIR DIRE

By Mr. Royall:

Q. Mr. Morgens, will you explain to me the sales promotion system, in very general terms, of Procter & Gamble, and where, in general, the costs, if there are costs, are incurred, and in what categories, in general, they are? I don't want a very detailed statement of it. A. We use a lot of different types of promotion plans, as most every other manufacturer does.

The most typical plan with which we are associated, I suppose, are the so-much-off-on-the-purchase, say five cents off on one package when you buy another at the regular price, would be an example.

Another example would be—

Q. Well, let's take that example, if I may interrupt you. That has an effect on the realization you get, does it, from the sale? A. All of what is commonly referred to as sales promotion costs, end up in three places in our accounting system. One

(Tr. p. 548)

is the reduction of realization. I don't know if you are familiar with that term, but, in other words, the reduction of your sales figure.

Q. The amount you receive on sales? A. The amount we receive on sales, yes, the reduction of realization.

Or it shows up as a higher factory cost, or it shows up as a selling expense, a sales expense.

For example, when you sell a 10-cent package for five cents, that shows up in our books as a reduction in realization. When you bundle a package, a 10-cent package which

Howard Joseph Morgens—Voir Dire Cross

sells for five cents, with another which is sold at the regular price, the cost of that bundling at the factory, the extra cost, shows up in a higher factory cost.

Q. You mean the mechanical operation? A. The mechanical operation of putting the two packages together.

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(Tr. p. 552)

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CROSS-EXAMINATION ON VOIR DIRE

By Mr. Tincher:

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(Tr. p. 553)

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Q. The same question for the coupons. Do I understand correctly that the coupons are sent in to P&G in Cincinnati and P&G then sends checks to the dealers or broker, whoever sent in the coupon? A. That is right. And it is my understanding that is part of selling expense on our books.

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(Tr. p. 556)

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Q. How does that work, sir? You say it's all broken down to each product. How does that work when the premium or the couponing or the advertising involves two or maybe half a dozen of the P & G products rather than just one product? A. Well, I assure you it works. We break every cost down by a brand. In the first place, only I'd guess less than ten per cent—that's an estimate—of our plans, what you call promotion plans, I believe, as illustrated by that, involve more than two products, and when they do each product is standing on its own feet, and those two products negotiate with each other and bargain

Howard Joseph Morgens—Voir Dire Cross

with each other for the best possible result as far as they're concerned. They are not forced into it. It's up to them. It could be just a negotiation as if it were with another company as to whether or not we wanted to cooperate with them. And the plan as to what each brand pays in those joint promotions is clearly established by negotiation between those brands. And I might say there's no more competitive or sharper negotiations than I've ever seen between

(Tr. p. 557)

our own brands trying to get together on a plan.

(Tr. p. 565)

DIRECT EXAMINATION

(Resumed)

By Mr. Tincher:

Q. Mr. Morgens, in advertising your food, case goods products and in Clorox as well these advertisements are primarily directed to the attention of the housewife, are they not? A. Yes, they are.

Q. I believe we've talked today at one time or another, sir,

(Tr. p. 566)

about various types of promotion techniques, two for one sales—let me enumerate them for you—two for one sales, then with the personal size Ivory there is the four for the price of three, is there not? A. I think so, yes, sir.

Q. And P & G also has used the technique of distributing free samples of the merchandise? A. On new products.

Q. On new products. And, of course, we've talked about the coupons which the customer sends in and premiums.

Howard Joseph Morgens—Direct

Now are there any other promotional techniques used by P & G that we haven't covered? A. Probably. I don't happen to think of any, but we—I think—Did you mention contests?

Q. Oh, no, sir, I did not. A. I don't think of any others.

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(Tr. p. 567)

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Q. Now does P & G have a separate department that handles all promotions or does each product have its own department for promotions? A. We have what we call a brand advertising and promotion organization on each product. They function on that product and on that product alone, and they compete with our other brands and other brand organizations that we have.

(Tr. p. 568)

Hearing Examiner Haycraft: When you say compete with, I don't understand quite what you mean by that.

The Witness: No, I mean—I'll take this example, your Honor. We have a brand man, what we call a brand man on Tide who is responsible for advertising and promotion on Tide. We have another brand man—and each of those may have one or more assistants—on Cheer. Now, we think of Tide as competing with Cheer, and we think—and those two groups are highly competitive of each other. They don't let on to the other one what they're going to do. They play on the element of surprise, and their plans—they don't sit in on the meetings of the other brand and learn what it's going to do. It's really a competitive organization.

Hearing Examiner Haycraft: Well, by that you mean there's nobody that sits over and controls—

Howard Joseph Morgens—Direct

The Witness: Yes, they head up obviously at some point to one person.

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The Witness: And the philosophy of the company—For example, Clorox heads up to a manager of Clorox and then to

(Tr. p. 569)

me, and a soap brand will head up to the head of the soap business and then to me, and that would be the only place they come together, but there is no competing for advertising funds. There is no pool of advertising funds which is shoved one way or the other. Each one gets from his own brand what's justified by that brand and by the operations of that brand, and it lives or dies on its own feet, and we—

Hearing Examiner Haycraft: Well, what fact would you take into consideration then? The results of previous years?

The Witness: The results of previous years, and some of our brands have died. But we don't think in terms of moving funds from one brand to another. That brand has to make a profit, and that brand has to compete—

Hearing Examiner Haycraft: Well, if you spend too much on advertising promotion, you won't make a profit?

The Witness: He certainly won't, and that's why he's not likely to—

Hearing Examiner Haycraft: And when he comes in with a plan they used before and successfully, why, you're more willing to spend money on it than you are something new?

The Witness: Generally speaking we have determined—we determine what we spend on a brand in two ways. One is by history of what you have to spend to be efficient, to efficiently distribute that brand.

Howard Joseph Morgens—Direct

Hearing Examiner Haycraft: That is to move it?

(Tr. p. 570)

The Witness: To move it and to have it be healthy.

Hearing Examiner Haycraft: And profitable?

The Witness: And profitable. We don't depart from that history because the brand's in trouble or because the brand is successful. We live with that history until we prove that something else would be more efficient, and if the brand's in trouble it's up to the ingenuity to get—

Hearing Examiner Haycraft: Well, don't you as an overall manager of it have anything to say about whether a successful method or procedure or policy with one brand could be used with another? Suppose, for instance, that Tide had been very successful in some type of promotion, housewives and so on, and Cheer has not been doing so well. Can't you suggest to Cheer to go—

The Witness: Your Honor, I certainly could suggest that, but as soon as Tide does anything that's successful not only do our other brands know it but our competitors know it because all of our advertising and promotion operations are highly visible. They're out in the open. You can see the copy; you can see the package; you can see the plan, the promotion plan. There is nothing secret that we have for more than about five minutes, speaking loosely. As soon as the plan hits the public then immediately your competitors within your company and outside your company are trying to evaluate what that man's—how successful that plan is.

(Tr. p. 571)

Hearing Examiner Haycraft: But you're the only one that really knows?

Howard Joseph Morgens—Direct

The Witness: Well, you can get a pretty good idea when there's something really good.

Hearing Examiner Haycraft: Of course, the others can tell when they have been hurt.

The Witness: They can tell when they have been hurt. They see the Nielsen figures.

Hearing Examiner Haycraft: Go ahead, Mr. Tincher.

Mr. Tincher: All right, sir.

By Mr. Tincher:

Q. Well, I take it—and correct me if I'm wrong, sir—but I take it that under the P & G policy that the company as such is not going to carry any dead wood on any product. The product must make its own place and be aggressive in its own way? A. That's correct.

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(Tr. p. 572)

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Q. Now in placing the advertising of P & G products, P & G uses what is known as group or mass rates, does it not, or what term do you use in describing the rates involved? A. We buy on the basis of the card rates as published.

Q. And those card rates provide for increased prices according to the volume and the continuous nature of the advertising, do they not? A. There are discounts published for all to see on the card rates.

Q. And to take advantage of those discount structures the P & G Company lumps all of its products in a given period, does it not, rather than placing each one separately? A. No. It places each one separately through its own advertising agency. We have currently about ten advertising agencies. I don't quite know what you're getting at, Mr. Tincher, but the maximum savings which

Howard Joseph Morgens—Direct

we have calculated that result from a reduction in advertising costs on Clorox after the Procter & Gamble purchase and before have been calculated at about \$50,000 on four million dollars worth of advertising, somewhere in that area. Now that's on the card rate. In addition, the Clorox people have told me that they can buy television spots less expensively at a lower cost.

(Tr. p. 573)

per message than Procter & Gamble people can buy, and that does not surprise me because a great many small companies can.

Q. Now the figure you gave—— A. Now that is off the card rate; that's below the card rate.

Q. The figure you gave of \$50,000, that was computed on the assumption that Clorox would continue to advertise in the future as it has in the past? A. On the basis—well, we are continuing to advertise the way the old Clorox Company advertised. We've made very few changes in their advertising. We thought it was a successful operation. We thought we'd be foolish to change.

Q. The answer to my question then is yes, that it was based upon the advertising that Clorox had done in the past? A. No. It's based on our present Clorox advertising on the one hand as against the Clorox advertising as was done by the Clorox Chemical Company, the former owners. They are very similar plans, but the calculation was based on what we are doing now and what we were doing before the acquisition.

Q. Mr. Morgens, is not the discount rate in advertising a very substantial amount? A. Mr. Tinker, I don't know what you mean by very substantial.

Q. All right, then, what is it, sir? A. The bulk of Clorox advertising is in daily newspapers.

Howard Joseph Morgens—Direct

(Tr. p. 574)

There is no discount rate that we get in daily newspapers. The only discount rates in daily newspapers are to the advantage of the local advertiser. The local rates are lower than the national rates. A local bleach company, of which there are many, buys newspaper advertising at a lower cost than in national advertising. Now the other type of media advertising which the Clorox Company does is they use some magazines, black and white, I think, half pages. There is a discount structure for magazine advertising, and we do have a lower cost on that part of the Clorox expenditure which goes into magazines, and that adds up, as I say, I'm told to \$50,000.

Q. What is the discount structure, sir, on the magazines? A. I can't really describe it. It varies I think on every publication. It's the card rate. It's a published rate which each magazine justifies on its own.

Q. That same question with reference to the television and radio. A. On television Clorox uses television spots. That depends again—that means it's bought at each individual station. The television spot card rates give some advantage to a larger advertiser than to a smaller one. However, as I said, the Clorox people tell me they can buy messages at a lower cost on television spots than we can, and I'd like to illustrate why that doesn't surprise me. We've had many a

(Tr. p. 575).

local advertising agency solicit our business on the basis that it was and can get television spots at lower than the published rate or can get preferred positions on television, which means that for the same money they can get a lower cost per message.

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Howard Joseph Morgens—Direct

Q. Now, Mr. Morgens, isn't it a fact that on television an advertiser who lumps a great many products together and buys a great deal of advertising can get his total advertising for as much as 30 to 40 per cent less than if he had taken each product separately and advertised it?

A. I don't know what the calculation is but I certainly don't think it's anything like that high. Mr. Tincher, on buying television, for example, it depends on whether—it's a very complicated rate structure, and I can't—I don't want to try to give it to you, but it depends on such things as if you're buying a half-hour program whether you buy one that's immediately adjacent to another half-hour so that you get an hour's rate rather than a half-hour rate. It's very difficult to buy a half-hour adjacent to another program. I

(Tr. p. 576)

don't think we have one. We may have one but I don't— Sometimes you spend years trying to get a solid—what we call a solid hour on the network to get that discount structure. It depends on so many things like that. I don't think I ought to try to recall it.

Q. Yes, sir. I realize that. It depends on many factors, the time of the day, the make of the program, the talent involved and all that sort of thing. But my basic question is, is it not a fact that in purchasing T. V. time or radio time that it is much more economical for a larger producer lumping many products together, regardless of the types of programs he buys, than it would be for him to buy the same program for the same product and pay for each product and each program separately? A. It is more economical on time. There are no advantages on talent, and, as you probably know, the talent costs frequently are the higher of the two costs.

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Howard Joseph Morgens—Direct

(Tr. p. 577)

Hearing Examiner Haycraft: If I understood your testimony, does the Procter & Gamble Company take advantage of this larger discount on time by lumping your various products?

The Witness: We have a viewpoint, your Honor, that the discount—what you gain from the discount isn't nearly as important as the proper media structure. We don't try to buy to get discounts. We buy the best advertising. Sometimes we get discounts. I'm not sure whether that's answering your question or not, but we pick up all the discounts that we have coming to us, but we don't determine our advertising program in order to take advantage of discounts.

Hearing Examiner Haycraft: Well, the reason I asked that question, I understood you to say in answer to previous questions that each brand of Procter & Gamble stands on its own feet in its advertising costs.

The Witness: Yes, sir.

Hearing Examiner Haycraft: And this question that he was asking you now would indicate that if Procter & Gamble lumped all these various brands together on television time or radio time, you might get a lower rate, that is, a discount by virtue of the fact that they had done that. My question is whether you do take advantage of such discounts by lumping together your various brands and various products.

The Witness: Let me see if I can explain that. Yes, we do take advantage of any discount that's coming to us. We'd

(Tr. p. 578)

be very foolish not to. But we don't lump them together in order to get that advantage except in one sense. Each

Howard Joseph Morgens—Direct

brand buys its own media and buys it through its own agency. There's no group purchase.

Hearing Examiner Haycraft: Then you say to the television or the radio, we have five of our products are taking so much——

The Witness: We buy on the card rate and the agency involved knows what else the company is buying from its contacts with the network. That's available to anybody, our competitors also, and the cost of that can be calculated including the discount, and that's what that brand pays. But it's a brand cost.

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(Tr. p. 585)

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By Mr. Tincher:

Q. Now, returning, sir, to the introduction of Gleem and Crest, these products were introduced to the public in a national campaign effort, were they not? A. Yes, they were. I understand they were expanded in steps across the country, not one fell swoop.

Hearing Examiner Haycraft: Do you operate on that plan of selling certain markets where you try them out first?

The Witness: Yes, we do experiment everything almost locally, and there we hammer out the basic plan and how much money should be spent, and so on.

Hearing Examiner Haycraft: So you get an idea how the public is going to react?

The Witness: Yes, we do. And then we usually expand sectionally. We don't go all over the country at one time. We move first in one part, then to another.

By Mr. Tincher:

Q. Well, what was the actual date, sir——

Howard Joseph Morgens—Direct

Mr. Royall: Well, your Honor—Go ahead, finish your question.

By Mr. Tincher:

Q. When was the actual date when national distribution and national advertising of these products commenced?

(Tr. p. 586)

Mr. Royall: Now, your Honor, we object. Our objection is directed to this, we're going to object to the details of these specific products that you're planning to now enter on the grounds that we do not believe they are relevant, these details are not relevant, and I don't want to repeat that objection each time in case your Honor should admit any, but I hope you will not admit any of these details.

Hearing Examiner Haycraft: Well—

Mr. Royall: No foundation laid.

Hearing Examiner Haycraft: It's hard to tell just where to draw the line. I do think we should have in the record a pretty good understanding of Procter & Gamble's policy of selling and advertising, and I suppose that these particular questions on these products illustrate as well as can be illustrated as to how Procter & Gamble distributes their products, and how they put them on the market.

I don't think he's going into sufficient details as to call for an objection. I'll overrule your objection at this time, and you may have a standing objection, and if I think he is going too far into such details I'll sustain it.

Mr. Royall: All right, sir.

Hearing Examiner Haycraft: Go ahead, Mr. Tincher.

A. To the best of my recollection we were national on Crest, finally reached the point we were selling nationally on Crest in the spring of 1956, the first part of 1956.

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Howard Joseph Morgens—Direct

(Tr. p. 588)

Q. Had Procter & Gamble ever been in the toothpaste business prior to the introduction of Gleem or Crest?

Hearing Examiner Haycraft: I sustain an objection on that. I don't see where we're going, Mr. Tincher.

Mr. Tincher: Mr. Haycraft, I'd like to do something I hate to do, and very seldom do, but I would like to proffer the answer to that question.

Hearing Examiner Haycraft: All right.

Mr. Tincher: The answer would be no, if allowed to answer.

The Witness: I would like, your Honor, to—

Mr. Royall: No, sir.

The Witness: —make sure—

Mr. Royall: That is not a fact, your Honor.

The Witness: I would like to make sure that you realize we were in the dentifrice business prior to the introduction of Gleem, even though we may not have been in the

(Tr. p. 589)

toothpaste business. We had one of our classic failures with the introduction of Teel back in 1940. I think that was used for brushing teeth even though it was liquid, and not paste in form.

Hearing Examiner Haycraft: I'm going to let everything stand.

By Mr. Tincher:

(Tr. p. 591)

Q. Does P & G have Nielsen or other survey figures which show the share of the toothpaste market which these products have enjoyed?

Howard Joseph Morgens—Direct

Hearing Examiner Haycraft: Now, I'm going to stop you on that, Mr. Tincher. The objection is sustained. It seems to me the testimony of the witness, until you can show something to the contrary, that anything you develop with respect to dentifrices or toothpastes, under those circumstances, the shelf space, and all that, as developed by the witness, will not have any relevancy to the market on bleaches.

There is such a contrast, such a difference between the two products, their uses and their method of sale and display and all that, that anything you might prove as to Crest and Gleem would not have any relevancy to the policy on Clorox.

Now, I'm not saying that is true of other products.

(Tr. p. 592)

But on those particular—I'm doing that now so as to obviate the time and necessity of going into it, the time that would be taken by you in further developing, and by counsel for respondent in rebutting.

I think the point that the witness has made, the testimony he has given us, and I say unless you have something to show it is relevant, to my own knowledge, my observation, of which I'll take official notice, there just isn't what I judge to be a relevancy between those two lines. Anything you would prove as to Gleem and Crest would not have any application to Clorox.

(Tr. p. 593)

Q. All right. Now let me ask you, Mr. Morgens, you're quite familiar, are you not, with the introduction and promotion of the product Comet? A. I am familiar with that, yes.

Howard Joseph Morgens—Direct

Mr. Royall: Same objection, your Honor.

Hearing Examiner Haycraft: Objection's overruled. Comet's in an entirely different category.

Mr. Royall: Yes, I know it is, sir. My objection is picking out specifics not——

Hearing Examiner Haycraft: Well, I'll give you the same standing objection, and when I think that he's going too far I'll rule. Otherwise it will be understood that your objection is overruled and you can keep going.

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(Tr. p. 595)

By Mr. Tincher:

Q. Would you answer the Examiner's question, please, as to how Comet was introduced? A. Are you asking about——

Hearing Examiner Haycraft: The history of it.

The Witness: The history of it?

Hearing Examiner Haycraft: Yes. I didn't recognize it.

The Witness: Comet is a scouring cleanser.

Hearing Examiner Haycraft: Of the Old Dutch Cleanser type?

The Witness: Generally speaking, yes, sir. It competes with Old Dutch, Ajax, that type of product.

It was tested during the spring of 1946 on experimental markets. Peoria, for example, and a few other cities scattered around the country. We went broadly in the central part of the country in the fall of '56.

Hearing Examiner Haycraft: '56 you say?

The Witness: '56.

Hearing Examiner Haycraft: I though you said something about '46 a while ago?

The Witness: If I did I misspoke myself. I meant '56.

Howard Joseph Morgens—Direct

Hearing Examiner Haycraft: All right, go ahead.

The Witness: We went broadly in the central part of

(Tr. p. 596)

the country in the fall of '56. We went into the balance of the country in the spring of 1957.

It has been very successful. Part of the plan was to sample the product, which we did by mailing a two ounce package, a cylinder. The produce was unique. We thought that the—And the customers showed they liked it almost immediately. It was a new and different type of product.

Now, it has achieved a fair share of the market right from the start.

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By Mr. Tincher:

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Q. I believe you just told the Examiner that the product acquired a fair share of the market. Is that correct?

A. Yes.

Q. And could you tell us what that share of the market was?

(Tr. p. 597)

A. Well, it is difficult always to give you a precise figure on share of market. My best recollection of what Nielsen shows is approximately 25%, maybe 26% of the scouring cleanser business at this time, in grocery stores only.

Understand when I quote a Nielsen figure, that we follow Nielsen, and use it mainly for determining the trends in the share.

Q. Yes. A. Rather than the absolute amount. We think Nielsen overstates our Comet business and all of our soap business, because it only pretends to show the share in the grocery trade, and it does not cover soap products

Howard Joseph Morgens—Direct

or cleanser products the share in drug stores or department stores. We know that we have a larger share of our business on those type of products in grocery stores than we do in the drug trade or department store trade.

That's why I say when we quote a Nielsen figure it usually represents a higher share of the total business on that product than is actually the case.

Q. Wouldn't the same be true, however, sir, of the other competitive market shares which are shown in the Nielsen report, for example on Ajax and Bab-O, the same would be true of them, would it not? A. It is not true necessarily of them. Colgate has been historically much stronger in the drug store than Procter &

(Tr. p. 598)

Gamble. They have a much larger drug store business than we have, and generally speaking they stand much better in the drug stores in relation to how they stand in the grocery stores than we do.

Hearing Examiner Haycraft: That's historically true, isn't it?

The Witness: Yes, sir.

Hearing Examiner Haycraft: They've catered more to the drug trade.

The Witness: They have, and they have a strong position in the drug business.

By Mr. Tinch:

Q. And it would be just the converse on something like Old Dutch Cleanser, would it not, sir? That's practically all in the grocery store? A. I would imagine they have about as much in the drug stores, maybe more in relation to grocery stores than we do. I'm not sure how they stand. I say maybe more just because they've been a well known

Howard Joseph Morgens—Direct

name for so long, and the drug trade usually moves a little slower, more slowly than the grocery trade.

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(Tr. p. 601)

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By Mr. Tinch:

Q. I take it by your answer, sir, that in the introduction of the products, such as Comet, that obviously at the beginning, for a certain period the product is not paying its way, the revenue coming in is not paying for the promotion going out. A. That certainly is correct. You

can't mail samples before you even have a—moved any off the consumer—off the dealer's shelf. You can't mail samples without going into the red on that operation.

Q. And the same would apply to the initial national advertising and promotion. A. (No response.)

Q. I say the same would apply to the initial national advertising campaign and promotion in conjunction with it. A. Yes, you take a gamble. Your volume is going

like this, and say you start your advertising like this. Over a period

(Tr. p. 602)

of time it has to pay, obviously.

Q. Had P & G ever been in the scouring cleanser business prior to the introduction of Comet? A. A long time ago I understand we made a scouring cleanser called Chic. I don't think it ever amounted to anything. I don't think it ever amounted to anything of much importance. But we did manufacture a scouring cleanser by that brand name.

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Q. Now, when Comet came out it had to compete against

Howard Joseph Morgens—Direct

well established and old brands such as Ajax, Bab-O, brands of that nature, didn't it?

A. Yes, it did.

Q. Now, when Comet was introduced did grocers in general allocate new shelf space to Comet, or did they merely shift

(Tr. p. 603)

or use shelf space that had previously been used for other scouring cleansers? A. I don't know where that shelf space comes from. It might come from canned fruit, it might come from—In the first place it's up to the store as to how it allocates its shelf space. We have very little control—We have no control over it; we have very little to do with it. And each store makes its own decisions about what it wants to replace, if it replaces—if a replacement is necessary. Sometimes there's new shelving and expansion, and, as you know, the stores have gotten much bigger recently than they used to be, on an average.

(Tr. p. 611)

Q. Now, all the P & G soaps, detergents, cleanser products, as well as Clorox, are used primarily in the bathroom, the kitchen or the laundry, are they not?

A. Yes, I think that's correct. All P & G soap products did you say?

By Mr. Tincher:

Q. Yes. Soap, detergents, cleansers and bleach.

Hearing Examiner: Would you repeat that again, where they are used?

Howard Joseph Morgens—Direct

Mr. Tincher: The bathroom, the kitchen and the laundry room.

A. I think that's approximately correct, yes.

(Tr. pp. 612-613)

Q. Now, in the grocery stores liquid bleach is stocked in with the soaps, detergents and cleansers, is it not?

A. By no means consistently. In fact, I have no statistics on this, but, naturally, I get in a great many grocery outlets.

Q. Certainly. A. It is not the common practice, I will say.

Q. Well, what section, then, is the Clorox generally stocked in? A. Well, it's usually stocked in the section of starches, bluing, mops, and buckets, and other products of that general category.

Q. And cleansers are usually in that same section, are they not?

(Tr. p. 614)

A. Cleansers vary a great deal. They're usually stocked with other cleansers. You can usually see Comet and Bab-O and Ajax and Old Dutch stocked together. Sometimes it's near the soap, and sometimes it's on the other side of the aisle from soaps, and sometimes it's around the corner.

By Mr. Tincher:

Q. Yes, I realize that. They are all stocked together, and bleaches are all stocked together, too, aren't they?

Howard Joseph Morgens—Direct

A. That is correct. Almost a separate category but not necessarily with soaps.

Q. They are not necessarily. But my question is, is not the bleach section usually adjacent to the cleanser section?

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A. I can't say that's any consistent pattern at all, that it's adjacent. You may have some information that I don't have on that. But I don't feel that I know enough to say that's the case. I don't believe it is.

By Mr. Tincher:

Q. Well, when you say it's not consistent, you do recognize that it does occur? A. Sometimes.

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(Tr. p. 620)

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Hearing Examiner Haycraft: How did you come to select the sample in the case of Comet?

The Witness: Well, we decided we had a product—we learned from the consumer that we had a product that the consumer immediately liked.

Hearing Examiner Haycraft: Where did you find that out?

The Witness: We found that out in consumer research long before we brought the product on the market. The product is distinctive in many different ways; green in color, it has a pine odor, it has an entirely different kind of abrasive material in it, which we think is finer, and does a better job than any other, and it also has this flavoring of bleach.

Once we learned that the product was immediately preferred to anything on the market, we knew that—we thought

Howard Joseph Morgens—Direct

(Tr. p. 621)

that the best way to sell that product would be to give the woman a sample and let her use it, see it, smell it, look at it, look at the result.

We then sampled the product in a few small towns, and we waited a period of months watching the result, making sure that that cost of sampling came back to us rapidly on that product. When it did, in conjunction with the many other factors that go to make up a product's success, which it has to be sold at the right price, for one thing, it has to have an effective story told about it, in the presentation to the public, and we thought we were ready to go broadly with that type of sample.

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(Tr. p. 622)

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By Mr. Tincher:

Q. All these experiments and evaluations which have to be made, even before a promotion is launched, so to speak, the ultimate objective of them is to find out what makes the housewife tick, and what she is thinking; isn't that right? A. How she will react, that's right.

Q. Now, how is the effectiveness of the promotion determined so you will know whether you want to use that again, or whether it should be continued, or whether it should be stopped, or anything else you would want to know about a promotion as to whether or not it is accomplishing results? A. Well, in the first place we wouldn't think of sampling again, we have done that so rarely. Sampling is a very expensive thing. You can do that only with a new product, or, unless you make some very revolutionary change in the product.

Howard Joseph Morgens—Direct

I really don't recall any time we have sampled more than an introduction of a new brand.

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(Tr. p. 623)

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Q. And these various methods of sampling and testing consumer reaction, sir, are they the most scientific methods that you know of today, at the present time, to determine this effectiveness; is that correct? A. That is correct; the most scientific methods that are known about it. The advertising agency business knows of these methods, they are available to everyone, the industry are competitors in all of them. They are available generally through the advertising business. We are certainly not the

(Tr. p. 624)

only ones that use them.

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(Tr. p. 625)

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Q. I see, sir. And the manufacturing subsidiary is the Procter & Gamble Manufacturing Company? A. That's correct.

Q. How are the products sold? Are they sold through another subsidiary, or, once again, do you have the—

A. The corporate setup is through the Procter & Gamble Distributing Company, which qualifies to do business in every state in the Union. The management setup, as such, is by divisions.

Q. And those divisions are broken down into what we have talked about as the case-goods division; the toilet goods— A. Soap products, toilet goods, food products, paper products.

Howard Joseph Morgens—Direct

We have a Cellulose and Specialty Division.

And Clorox Company is run separately, as a separate company, even though in its organization along management lines it is run the same way as a separate division might be.

Hearing Examiner Haycraft: Clorox is manufactured

(Tr. p. 626)

by the—

The Witness: Clorox is manufactured by The Clorox Company.

Hearing Examiner Haycraft: It is not by the—

The Witness: Not by the Procter & Gamble Manufacturing Company.

Hearing Examiner Haycraft: Does it maintain its own separate sales organization, too?

The Witness: It does.

Hearing Examiner Haycraft: Because it sells to a different class of trade?

The Witness: Yes. The sales organization is under the Clorox Company name, not under the Procter & Gamble Distributing Company name.

By Mr. Tincher:

Q. Do you, as president of The Clorox Company, have sufficient control of that corporation to exercise policy and executive discretion within it? A. Yes, I believe I do, yes, sir.

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(Tr. p. 629)

Courtroom No. 1, Room 805
United States Post Office and
Courthouse /
Cincinnati, Ohio
February 4, 1958

Howard Joseph Morgens—Direct

Met, pursuant to adjournment, at 10:00 o'clock a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

* * * * *

(Tr. p. 631)

PROCEEDINGS

Hearing Examiner Haycraft: The hearing will come to order.

Mr. Morgens will resume the witness stand.

You may proceed, Mr. Tincher.

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(Tr. p. 657)

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Hearing Examiner Haycraft: Well, I think the question—

The Witness: I would like to—

Hearing Examiner Haycraft: —goes a little deeper than that. I think we thoroughly understand that feature of it, but I think what Mr. Tincher is trying to get at is whether or not it is the policy or the plan of Procter & Gamble Company, when they have learned all these things, to expand the distribution of those various products, utilizing their sales organization, their advertising know-how.

The Witness:

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(Tr. p. 658)

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When it comes to Clorox, we have there what we would call a fully-developed business. Clorox has a higher share of market than any product that Procter & Gamble has

Howard Joseph Morgens—Direct

ever had in its history, to my knowledge, certainly higher than any product that Procter & Gamble has now.

We think any product in that area of share of market is probably vulnerable, and I am quite sincere in saying our first and our major hope is that we would be able to hold somewhere near that share of market controlled by the—not—by Clorox.

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(Tr. p. 660)

The Witness:

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And Clorox has a much larger share of the market than anything we have ever seen. I think we are competent in our field to build a brand, but we have not shown anything like

(Tr. p. 661-A).

the competence the old Clorox Company had.

Q. I take it, then, the Clorox Company was an extremely successful merchandiser and advertiser. A. I have a tremendous respect for them, and if we can be anywhere near as good we will be happy.

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(Tr. p. 662)

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Q. Now, all these products we've been talking about, Mr. Morgens, the cake mixes, the paper products of Charmin, peanut butter, and, of course, Clorox we've been talking about, all

(Tr. p. 663)

these products are sold in grocery stores, are they not, sir? A. Yes, they are.

Q. And all have the majority, if not the great majority, of their sales in grocery stores? A. Yes, they have.

Howard Joseph Morgens—Direct

Q. And all of these products depend upon consumer demand in order to be sold? A. They depend on a great many things, one of which is consumer demand, yes.

Q. And in each of these cases, consumer demand has a great deal to do with the advertising and promotion that's given the product, has it not? A. If I were saying it I would reverse it. I think advertising and promotion have a good deal to do with consumer demand.

Q. Right. A. Not necessarily the most important thing to do with consumer demand, but a great deal to do with it.

Q. Now, another test that all of these products face, they all must be quality products. Isn't that right? A. Well, if they're going to be Procter & Gamble products we believe they ought to be quality products, yes.

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(Tr. p. 670)

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Q. Mr. Morgens, does The Clorox Company have contracts with its distributors which require, or does it have arrangements with the retailers and the dealers which require The Clorox Company to repurchase merchandise?

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A. We have no contracts that I know of. There may be some kind

(Tr. p. 671)

of letter or understanding which I do not know of. Clorox Company's arrangements with these distributors have been going on for many years, and my understanding is we could change any distributor any time we so desire.

Howard Joseph Morgens—Direct

By Mr. Tincher:

Q. Your answer is no? A. If there's a 30-day understanding that may be in a contract or a letter of some kind, I don't know. But it isn't a significant part of our arrangements with the distributors.

Q. Well, so far as that goes, Mr. Morgens, there is no contracts between The Clorox Company and its distributors. A. That's what I——

Q. Am I correct? A. To my best understanding that is correct.

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(Tr. p. 675)

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Q. All right, sir. Let me ask you if the general, or national rate, which is described on the page of this exhibit which I

(Tr. p. 676)

have given you is more or less than the local rate which is described? A. In practically all instances it's more than the local rate.

Q. And why is that, sir? A. It's just a practice in the newspaper trade.

Q. Well, do we understand you that a newspaper, say the Cincinnati—any Cincinnati newspaper will charge Procter & Gamble more to advertise than it will to a local company selling the same product? A. That's correct.

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(Tr. p. 677)

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Q. Can a local producer use a national advertising agency and get the national rate? A. A local company—My understanding of this is this: That a local company, a department store here, a local manufacturer

Howard Joseph Morgens—Direct

(Tr. p. 678)

can advertise in a local newspaper at a local rate.

(Tr. p. 690)

Q. Well, my question is, sir, Is not the product Comet sold by the same salesmen who sell Spick and Span, and Tide, and Cheer, and Duz, and Oxydol, and Ivory and Camay? A. Yes, it is.

(Tr. p. 698)

Q. Then to catch the quantity aspect of your desired product the independent surveys such as Nielsen and those are used; is that correct? A. They are the best guide that we know to use, even though we know they, too, have to be interpreted with judgment.

(Tr. p. 737)

Q. Let me show you Pages 2 and 3 of Commission's Exhibit Number 21, Mr. Morgens—

Hearing Examiner Haycraft: 221-B.

Mr. Tincher: 221-B.

Hearing Examiner Haycraft: Yes.

By Mr. Tincher:

Q. It's rather awkward to handle. You'll notice thereon the minimum requirements are called to the attention of the salesman for a satisfactory shelf space arrangement, and also criteria are listed for an unsatisfactory shelf space. Then on

Howard Joseph Morgens—Direct

(Tr. p. 738)

the following pages you'll see pictorial representations of what is considered satisfactory and what is considered unsatisfactory. A. Yes.

Q. All right. Now, sir, does the salesman who enters the particular store make the determination of whether or not the P & G products at that store meet the minimum requirements of a satisfactory shelf space arrangements? Of course, I mean by that as far as the company is concerned. A. Does the salesman make the determination whether it is satisfactory or unsatisfactory? Well, he makes one determination, I would say.

Q. And does he send that to his district office? A. Yes. I suppose he does, if requested to do so. I don't know that it is done as a routine matter.

Q. Well, let me ask you this: It is one of the normal duties of a salesman, is it not, to use this booklet and to attempt in the chain stores to obtain what is listed there as a minimum requirement, and to obtain, of course, better than the minimum if he can? A. Well, I would have to answer that this way: It's one of the salesman's normal duties to make sure, to try to secure adequate shelf space for our brands. And this booklet, I don't know whether he uses this booklet. I've been with a number of salesmen, and I haven't seen any of them use it, but certainly

(Tr. p. 739)

for his information this helps him in his thinking about how he wants to talk to the chain about shelf space.

Hearing Examiner Haycraft: He takes that up with the local manager, doesn't he?

The Witness: It varies with the chain. Most often the salesman has very little control over the shelf space that

Howard Joseph Morgens—Direct

comes down from the chain headquarters. Frequently the instructions from chain headquarters are not carried out in the store, and any salesman who is familiar with those instructions can be helpful——

Hearing Examiner Haycraft: Well, suppose the salesman isn't satisfied? Suppose he attempts to get more shelf space, and the local manager tells him, "Well, I can't give it to you. I'm limited. I've got my instructions." Then what is the salesman supposed to do? He feels P. & G. is being discriminated against. What does he do?

The Witness: In the first place the salesman probably is never satisfied, and his best recourse is to work with the chain headquarters.

Hearing Examiner Haycraft: I say does he have the authority to work with the chain headquarters in the local city?

The Witness: It depends on the size of the chain. Sometimes he has authority to work with them, sometimes he has to work with the unit manager.

Hearing Examiner Haycraft: Does he ever take it up

(Tr. p. 740)

with the divisional manager in the P & G organization to have them take it up with——

The Witness: Sometimes it goes that far.

Hearing Examiner Haycraft: ——the higher manager of the chain?

The Witness: Well, more than likely the division sales manager will go out into a district, and he will go into some stores and see, and if it is too bad then we will ask why, something about the problems of that chain. And in rare instances he might even go see the chain manager himself and discuss it.

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But in most cases we find the division manager stays away—they should stay away, as it tends to undermine the responsibilities of the local manager.

Hearing Examiner Haycraft: The local manager tries to work it out himself.

The Witness: That's correct.

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(Tr. p. 747)

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By Mr. Tincher:

Q. Now, I think I understand your testimony correct, sir, prior to acquiring Clorox Chemical Co., P & G at that time at least was not producing either a liquid or a dry bleach.

(Tr. p. 748)

A. We were not in the bleach business at any time to my knowledge in our history.

* * * * *

Q. I understand, sir—We discussed the distributors of Clorox this morning. Do I understand correctly that every distributor who was distributing for the Clorox Chemical Co. is now distributing for The Clorox Company? A. I haven't heard of any changes. There may have been one that was dropped, and another replaced him in one area, but I think, certainly substantially that is correct.

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(Tr. p. 752)

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Q. Mr. Morgens, under these contracts with the washing machine manufacturers, P & G pays the manufacturers a dollar for each demonstration wherein the P & G product is used, does it not? A. I think that's right.

Howard Joseph Morgens—Direct

It sounds right to me. I'm not as up to date on it as I would like to be. That's for a home demonstration, a demonstration in a home.

Hearing Examiner Haycraft: Is that usually where the retail dealer servicing the machine goes out to the home to show the housewife how to operate the machine?

The Witness: An automatic washer needs to be installed in a home.

Hearing Examiner Haycraft: Yes.

The Witness: At the time the automatic washer is installed there's usually a demonstration in the home.

Hearing Examiner Haycraft: By someone from the firm she bought it from.

The Witness: That's right.

Sometimes that is done by a representative of a manufacturer; sometimes it is done by a representative from the distributor who is responsible for the distribution in that area; sometimes it's even done by a representative of the dealer who is serviced by a distributor who in turn is serviced by a manufacturer.

(Tr. p. 753)

By Mr. Tincher:

Q. And dealers also have demonstrations on the premises of their stores, do they not? A. That is right. I don't think you'll find that we pay anything like that much for the in-store demonstration, to use your phrase.

Q. Now, under these arrangements, the washing machine manufacturers also advertise and recommend P & G products in those advertisements, do they not?

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(Tr. p. 754)

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Howard Joseph Morgens—Direct

A. These are advertisements which Procter & Gamble wanted featuring—These are Procter & Gamble Tide advertisements.

By Mr. Tincher:

Q. Oh, I see. A. These are not advertisements of the washing machine company.

Q. Procter & Gamble pays for those advertisements?

A. They are our ads, yes.

(Tr. p. 755)

Q. Mr. Morgens, when did these contractual relations commence with the washing machine manufacturers?

(Tr. p. 756)

A. Approximately two or three years ago. At that time the product All had all of these tie-ups, and we were trying very hard to get them, without much luck. Since All has been transferred to Lever Bros. through acquisition, for one reason or another they haven't been as active.

(Tr. p. 759)

Q. Let me ask you, Mr. Morgens, just for your own personal knowledge of whether or not the product All is being promoted in this manner at the present time in conjunction with any automatic washing machine.

Mr. Royall: Objection.

Mr. Tincher: Now, sir, I'm seeking—

Hearing Examiner Haycraft: Overruled because the witness brought that in.

Mr. Royall: Yes, sir.

Howard, Joseph Morgens—Direct

Hearing Examiner Haycraft: Go ahead. Answer the question.

A. The question is of my personal knowledge. I can't answer that. I don't know.

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(Tr. p. 760)
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Q. Now, I think the Examiner has already questioned you about this. Do I understand that commencing in 1956 P & G entered into similar contracts with various automatic dishwasher manufacturers in conjunction with the product Cascade? Would that be the approximate right date? A. It was either '55 or '56. I'm not sure.

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(Tr. p. 761)
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Q. Can you tell us, Mr. Morgens, the other automatic dishwashing machines that have this promotional arrangement with Cascade? A. My last understanding—and I don't pretend to be up to date—was that—I haven't heard anything different—is that G. E. was the only company which was doing it exclusively for Procter & Gamble, and that was on the basis of some peculiarity about their machine; they thought our product worked best in it.

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(Tr. p. 762)
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Q. All right. Now will you tell us what personnel was involved in the P & G organization as far as researching and investigating and determining whether or not the acquisition should take place? A. Well, I'll say it was largely my own determination, but I sought first the

Howard Joseph Morgens—Direct

approval of the president of the company at that point and the concurrence of the administrative committee group of the company. Obviously I wouldn't act on anything of that importance without doing that.

Q. Right, sir. And prior to consulting with those people you had to know pretty well where you were before you would go see them, did you not? And when I say where you were, I mean

(Tr. p. 763)

as to what would be involved in the acquisition and the possibilities of success or failure in the acquisition. A. Yes. I would certainly have to have a case in mind.

Q. And to prepare yourself with those facts, what studies did you undertake or make or what studies did you have made for you? A. Well, we had market research studies available on the bleach business that showed such things as the number of women who used it and the ages of the women who used it, the type of homes that used it and some pieces of information about the purposes for which they used it, not by any means complete.

We, of course, had Nielsen figures available to us because the Clorox Chemical Company had subscribed to Nielsen and made available to us the back reports. We had the Clorox Chemical Company's record of shipments and profits. We worked with the Clorox Chemical Company people to understand their business. Other than that I don't recall really very much. I assume that there were—that the other officers of the company whom I asked for concurrence with the view might have spent a little time on their own with digging into it.

Q. Well, would it be a fair statement to make, sir, that P & G exhausted all possible or conceivable methods of in-

Howard Joseph Morgens—Direct

vestigation that were reasonable prior to expending the thirty million dollars for the acquisition?

(Tr. p. 764)

A. We exhausted everything reasonable we could, we thought—of course within the time limits involved.

Q. And in so doing you had your own market research department make various investigations? A. I suppose we did. I don't recall any specific surveys that we asked them for. We had a knowledge of the bleach business from past studies because we require some knowledge of the bleach business.

Hearing Examiner Haycraft: What kind of study?

The Witness: Market research, consumer studies.

By Mr. Tincher:

Q. Well, as I understand your testimony this morning, sir, the market research department would not undertake a survey on its own, would it? A. No, it would not.

Q. If they made one on bleach, it would have to have been because somebody wanted a survey? A. That is correct. But there were old market research studies on bleach that were requested by men having to do with soap products. For example, there are ingredients added to soap products, particularly in the fluorescer field, some of which are incompatible with bleach, some of which were compatible, and we had to develop a little background to the extent of which bleaches were used in order to make a better soap or detergent product.

(Tr. p. 765)

Q. So you had some knowledge of the bleach business several years prior to the time you were thinking of acquiring Clorox Chemical Company? A. We did, I would—Yes.

Howard Joseph Morgens—Direct

Q. Who is Mr. E. A. Snow in the P & G organization?
A. At the present time he's our advertising manager.

Q. And what was his position in October, 1955? A.
He was what we call promotion manager.

Q. And was he advertising manager in February of last year? A. He became advertising manager in October, 1957.

Q. And do you know a Mr. M. P. Link, Jr.? A. I do.

Q. Was he under Mr. Snow's supervision? A. Yes, he was.

Q. And the same question for M. T. M. Warrington?
A. At what time?

Q. In 1955, sir, October. A. 1955? Yes, he was in 1955. He was transferred to a different position in January, '56.

Q. Mr. Morgens, I'll hand you what has previously been marked as Commission's Exhibit 323 for identification and Commission's Exhibit 324 for identification. These documents were provided to me by your counsel in answer to the subpoena duces tecum, and I'll ask you if those—

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(Tr. p. 766)

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By Mr. Tincher:

Q. Have you had a chance to look at those documents, sir? A. Yes, I've had a chance to look at them.

Q. I'll ask you if those documents are not the reports you were discussing a moment ago as having been made in reference to selling soap products to obtain necessary bleach information.

(Tr. p. 767)

A. No.

Howard Joseph Morgens—Direct

Q. I'll ask you then what was the occasion of these studies being made? A. Well, I see a lot of reports. This one dated October 26, 1955, came within a month or two after we first told the Clorox Company of our interest in discussing an acquisition with them, and I assume it was based on—well, it leads up to—its opening statement is, "We feel the company should consider getting into the liquid bleach business by purchasing the Clorox Chemical Company." So I assume—

Q. Well, I take it then that these two documents were made— A. Specifically with the Clorox Company in mind, if that's what you mean.

Q. Right. And whose attention were those documents called to after they were made? A. I believe I saw these documents at the time. I'm sure I did.

Hearing Examiner Haycraft: And who prepared them?

The Witness: These were prepared by two men in the advertising department of the company.

By Mr. Tincher:

Q. And these are documents which were prepared to assist you in determining whether or not it was advisable to buy the Clorox Chemical Company?

Hearing Examiner Haycraft: Well, he's already said

(Tr. p. 768)

it was preliminary.

A. Yes, I would guess you'd say that. They were prepared at least to assist the advertising manager of the company to have a view as to whether or not he should concur along with other important people on the administrative committee, whether he should concur in this acquisition.

Howard Joseph Morgens—Direct

Hearing Examiner Haycraft: I think you've laid sufficient foundation.

Mr. Tincher: All right, sir. I offer at this time Commission's Exhibit 323 and 324.

(Tr. p. 769)

Hearing Examiner Haycraft: R. & D. D., is that research development division?

The Witness: Yes, R. & D. is research and development.

Hearing Examiner Haycraft: What does P. & A. mean?

The Witness: P. & A. refers to profit and advertising.

(Tr. p. 770)

Mr. Royall: Your Honor, not to argue my objection, but I'd like to say that this was not called for in the subpoena. However, we gave it to them with the others, and therefore I'm in less position to object.

Hearing Examiner Haycraft: I'm going to ask the witness if he will with his fountain pen physically put those words in there so we won't have to look at the text every time to find out what that means. You can put your initials on it.

(Tr. pp. 771-772)

Hearing Examiner Haycraft: Did you object to those exhibits?

Mr. Royall: I objected to the one in '55, your Honor.

Hearing Examiner Haycraft: The objection is overruled. Exhibit 323-A, B and C, and Exhibit 324-A, B, C and D are received in evidence.

Howard Joseph Morgens—Direct

By Mr. Tincher:

Q. Now, Mr. Morgens, I will hand you what has previously been marked as Commission's Exhibit 321 for identification, which is a 27-page paginated document; and Commission's Exhibit Number 323, which is a 13-page paginated document, and I will ask you if these documents were not prepared by the market research department in connection with your testimony a moment ago when you testified that such reports were made when the acquisition of Clorox was being considered? A. They were certainly prepared by our market research department.

Mr. Tincher: I offer these two exhibits at this time, sir.

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(Tr. p. 773)

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Q. Mr. Morgens, I will call to your attention that on both of

(Tr. p. 774)

these exhibits reference is made to a Psychological Corporation. Would you tell us what that is? A. Well, I may have misspoken myself. I looked down here and I saw the Market Research Department signature. The information shown in this report is obtained in connection with the 1957 Psychological Corporation Brand Usage Study. That is an outside market research company, which we and others employ to get certain types of information for us. The information is then reported to Procter & Gamble and the market research department retabulates it and puts it out in this form.

Q. And puts it in the type of categories that are of interest? A. Yes. It probably assembles the informa-

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Howard Joseph Morgens—Direct

tion in accordance with the requests that they receive as to how that information should be broken down.

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(Tr. p. 781)

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(The documents referred to, heretofore marked Commission's Exhibits 321 and 322 for identification, were received in evidence.)

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(Tr. p. 785)

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Courtroom No. 1, Room 805,
United States Post Office and
Courthouse
Cincinnati, Ohio

February 5, 1958

Met, pursuant to adjournment, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

* * * * *

(Tr. p. 787)

PROCEEDINGS

Hearing Examiner Haycraft: Come to order.

The witness will resume the stand.

Howard Joseph Morgens, resumed the stand, and further testified as follows:

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(Tr. p. 790)

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By Mr. Tinker:

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Howard Joseph Morgens—Direct

(Tr. p. 792)

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Q. All right, sir. Now, you have used Nielsen very extensively throughout—when I say you I mean the company has used Nielsen very extensively, have they not, over a period of years? A. The company has used it very extensively to determine the trend of the share of the market that it's various brands have.

Q. Now, in the absence of actually having access to the exact down-to-the-penny production of sales of every single producer, do you know any better way to find out this trend of market share than Nielsen? A. I don't know of any better way. I think this is probably the single best guide, if one had to pick a single guide and then put it in with a lot of their other experience.

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(Tr. p. 796)

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Q. Mr. Morgens, let me hand you again Commission's Exhibit 325 for identification, and I will ask you to recall the questions and answers that we have had this morning concerning that document already, and I will ask you if you have any additional information to add as to how this volume is used, or how the various sections in it are used or interpreted.

(Tr. p. 797)

by P & G? A. I have already testified that we rely on Nielsen primarily for the purpose of observing trends in share of market. The share-of-market figures in Nielsen's reflect movement out of the grocery store to the consumer. They arrive at those figures by having men who go to the grocery stores and count the stock at a given store, let's

Howard Joseph Morgens—Direct

say on August 1st, and then return and count the stock in that same store on October 1st. They have an arrangement with the owner of that store whereby they can examine the invoices, which show how much merchandise was received, and they, by subtracting the ending inventory from the total of the beginning inventory and the merchandise received, they get a figure which they assume is what has moved out of the store into the homes.

Q. During that given period? A. During that given two-month period. And that represents the movement from that store to the home.

They also make the same calculation on other brands in the same line, and arrive at a 100 per cent figure and allocate a share figure to each brand within that 100 per cent.

Hearing Examiner Haycraft: How many stores do they do that in?

The Witness: They do it in a sampling of stores. I don't recall the exact figure. I mean, I don't know the

(Tr. p. 798)

exact figure now. At one time, not too long ago, it was, I believe, 2200 stores across the country.

Hearing Examiner Haycraft: Do you know how these stores are selected?

The Witness: They are selected, by a professional statistician's approach, to be typical of all types of outlets in all parts of the country. Therein lies room for error.

Hearing Examiner Haycraft: That's both urban and suburban?

The Witness: Urban, suburban, rural and country.

Now, opinions differ, as they are bound to do, among statisticians about how reliable and typical this sample is. For example, Nielsen cannot get any information out of any A. & P. Store, which does 10 per cent of the country.

Howard Joseph Morgens—Direct

A. & P., like most of the big chains, have pretty high development on their own private brands of bleach, soap, others, and they just make a projection from the figures they do get of what they think A. & P. might be, and therein is room for error.

There are statisticians that think it does not even attempt to cover the rural South, for example, and you would make an adjustment for that.

Let me all this to show that although we think Nielsen is the most reliable single index for determining trend in share, we don't lean on it 100 per cent, by any means,

(Tr. p. 799)

for determining the level of share.

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(Tr. p. 800)

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Q. In connection with the worth and the value of this report, sir, what is the cost to a subscriber to Nielsen for a product study such as these reports, the one you hold in your hand? A. I am sorry I can't tell you that. We have asked, yesterday, at your request, that Nielsen mail in a contract form, which is

(Tr. p. 801)

the one we sign, and which we will be glad, I assume, Mr. Royall?

Mr. Royall: That's right.

A. (Continued) —to submit to the Court. I did look at the contract form enough to ascertain that this information is available to a small manufacturer at a much lower cost, a much lower basic cost than the larger manufacturer. On the first page of that you will see that he grades up, a manufacturer having sales of less than

Howard Joseph Morgens—Direct

\$500,000 can purchase the information for—I forget the exact figure, but I believe about a fifth as much as a manufacturer having sales of, let's say, \$15,000,000 or more.

Once he compiles this information, let's say on bleach, he was compiling it for Purex, and probably other bleach manufacturers during that past history when Procter & Gamble was not buying it, but the information is available to anyone who wants to step up and buy the past history at any point. But he doesn't collect that past history just in hopes of making a sale at some future point. That's why it happened to be available.

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(Tr. p. 810)

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Q. However, during the period preceding an acquisition where \$30,000,000.00 is going to be spent, the staff would be more prone to find out all possible details they could so their report to you would not backfire, would they not?

A. We went on the information given to us by the Clorox Chemical Co. about their business, and our own accountants found out about their business, and the only information I think anyone looked at on Nielsen was the trend of the share

(Tr. p. 811)

of market, because that's all we really rely on, and the trend of the share of market shows the figure on share which represents movement from grocery stores to housewives.

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(The document referred to, heretofore marked for identification Commission's Exhibit 325, was received

Howard Joseph Morgens—Direct

(Tr. p. 812) •

in evidence.)

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(Tr. p. 816)

Q. The Clorox Company distributes all labels used on Clorox products, does it not, rather than the distributor placing the labels, themselves? A. The labels are placed on the bottles of Clorox at The Clorox plant. The distributor does not do that.

Q. And the same is true of advertisements placed in newspapers. They are placed by The Clorox Company and not by the distributor? A. That's correct.

Mr. Tincher: Mr. Reporter, I would like to have marked at this time as Commission's Exhibit Number 336, Page 17 of the Erie, Pennsylvania Times, Monday, November 25, 1957.

(The document referred to was marked Commission's Exhibit 336 for identification.)

By Mr. Tincher:

Q. Mr. Morgens, I hand you Commission's Exhibit Number 336 for identification, and refer you to the large ad of Clorox, and I'll ask you if that is not an ad of The Clorox Company? A. That's an ad of The Clorox Company.

Mr. Tincher: I offer the exhibit at this time, sir.

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(Tr. p. 817)

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Hearing Examiner Haycraft: Commission's Exhibit 336 for identification will be received in evidence.
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Howard Joseph Morgens—Direct

(Tr. p. 818)

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Q. Mr. Morgens: I will hand you Commission's Exhibits 337, 338 and 339 for identification and ask you if these are not labels put out by The Clorox Company for its products? A. These are labels put out by The Clorox Company for the products sold in two test markets, one Erie, Pennsylvania, and one Evansville, Indiana.

Mr. Tincher: All right, I'll offer the exhibits, sir.

Hearing Examiner Haycraft: Did you say it was put on about the same time as the newspaper ad, November, 1957? The other Exhibit, 336, does it support that, or about that

(Tr. p. 819)

time? See, they're undated.

The Witness: Well, if I could look at the newspaper advertisement.

Mr. Tincher: I think he should read them in conjunction with each other, sir.

Hearing Examiner Haycraft: That's what I thought. I am trying to get a date on them.

The Witness: I'm sure these labels were on the——

Hearing Examiner Haycraft: Containers?

The Witness: On the Clorox in the stores in Erie, and one other city, at the time the newspaper advertisement appeared.

I could give you background on that if I were asked.

Hearing Examiner Haycraft: Commission's Exhibits 337, 338 and 339 for identification will be received in evidence.

(The documents referred to, heretofore marked for identification Commission's Exhibits 337, 338 and 339, were received in evidence.)

Howard Joseph Morgens—Direct

By Mr. Tincher:

Q. I think you said in connection with these advertisements, sir, especially the newspaper ad that you were conducting a test market in Erie, Pennsylvania? A. That's correct.

(Tr. p. 820)

Q. As a matter of fact, sir, the Purex Company was trying to conduct a test market, were they not, when these advertisements appeared, with Clorox? A. That's correct.

Q. Mr. Morgens, it's kind of difficult to conduct a test, isn't it, when your competitor comes in while you're trying to test and does the same thing? A. Not at all. Would you like me to elaborate on that?

Q. Well, I think I'll let Mr. Royall have you elaborate on that.

Hearing Examiner Haycraft: I would be glad to have him elaborate on it.

Mr. Tincher: All right, sir.

Hearing Examiner Haycraft. Do it for me.

The Witness: The Purex Company entered Erie, Pennsylvania with some pretty heavy couponing. It was not in Erie, Pennsylvania prior to that. We understood that the Purex Company was using—we suspected the Purex Company was using that as a plan which they would later extend to a much broader area. We didn't want to lose our shirts on Clorox but we wanted to test a plan that would give some defensive measure of their attack if they later extended it. The Purex people certainly would not—

Hearing Examiner Haycraft: Let's not discuss what they would do. Let's find out what you did.

Howard Joseph Morgens—Direct

(Tr. p. 821)

The Witness: That's what we did.

By Mr. Tincher:

Q. Would you do the same, Mr. Morgens, to any other liquid bleach producer who hasn't been in an area and tries to get in? A. I don't know. We are not anxious to lose business. You can't—Any manufacturer, including Purex, that wants to get into a new area is going to get some business. And you try to—You can't prevent it. But you try to lose as little as you possibly can, obviously.

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(Tr. p. 822)

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Q. Do you consider a bleach producer trying to come into an area where he hasn't been an attack on Clorox?

Mr. Royall: Your Honor, I won't object to that question if you permit the witness to give a full answer.

Mr. Tincher: It might be very appropriate for him to give a full answer, sir, on that.

Mr. Royall: All right.

A. Any brand with a high share of market is very vulnerable. That's Number One. In anything like a free market, and this certainly is a free market.

We don't know of any brand that's been able to retain as high a share of market, our own included, over any period of time, when someone wants that business, is willing to enter a new field, or—when someone wants to enter new into the bleach business it is inevitable that we will lose some share.

We don't attempt to, it would be fruitless for us to spend the kind of money—it would be very unprofitable for us to spend the kind of money that would be necessary to attempt to retain that kind of share. But we look for the

Howard Joseph Morgens—Direct

kinds of promotions, and try to measure them in an experimental market, that might enable us to meet a situation of that kind.

(Tr. p. 823)

in an economical way.

Q. Now, when you say that Clorox has been very successful in retaining its high market share, is it not a fact that Clorox Chemical Co. had been exposed to similar situations such as is represented by those coupons, where a competitor comes into the area and has a couponing deal, and Clorox Chemical Co. never came back, as The Clorox Company came back as set forth in those ads? A. Well, I am not saying we are as right in doing this as the Clorox Chemical Co. was, but I do say the only way we have to learn how right they were, or how right we are, is to experiment in a market. That's the learning process.

Q. You were already in the Erie, Pennsylvania market, were you not? A. Yes, but we have to experiment with meeting a competitive situation.

Q. The ads—I will show this to you, you may want to look at it—it says that the offer is limited to Erie County, Pennsylvania. Are you aware of that? A. I was aware there was a test in—Yes. That wouldn't be unusual.

Q. And it is a fact, is it not, that that is the exact and identical area that the Purex Company was testing in?

A. That's right. We were trying to test an action in a given market situation, where there was a certain competitive

(Tr. p. 824)

condition, and we thought—I will stop. I am sorry.

Q. Now, how about the Evansville, Indiana area, is that where you mentioned another test market? A.

Howard Joseph Morgens—Direct

Yes. I am not quite as clear on that one, but there was a special competitive situation of some kind, which I don't really recall.

Q. And who was the competitor in that instance, sir?

A. I think it was Purex, also.

Q. Once again, were they trying to make a new entry into a market area they had not been selling in? A. They were spending on that type of promotion, couponing, it was very unusual, that type of expenditure, in that area.

Q. Then they had not been selling in that area before?

A. I believe they had. I believe that was an area in which they were already marketing.

Hearing Examiner Haycraft: In both of these instances how long had they been in there with this special couponing?

The Witness: I can't answer that, in specific terms, your Honor.

By Mr. Tincher:

Q. Let me suggest, Mr. Morgens, to try to help answer the Examiner's question, that the Glorox ad came out within a matter of days, less than a week, after the Purex announcement

(Tr. p. 825)

was officially made? A. It was certainly a very short time. And I might say—I hesitate to elaborate here unduly, and if I do, you tell me, if I am out of order, because I am not familiar with these matters. But if we were making the move that Purex made we would welcome this kind of counter-action, so that we could ascertain what we would be up against if we went broadly, or what we might be up against.

I don't believe that we would assume that we could coupon broadly in a new area with the kind of advertising

Howard Joseph Morgens—Direct

and promotion expenditures they were spending in Erie without some retaliatory action, and it would be advantageous for us to measure what we were doing against a retaliatory action rather than in a vacuum.

* * * * *

Hearing Examiner Haycraft: These are the only cities in which you made such a test?

The Witness: To my knowledge, that's correct, yes. In each case the market situation in those communities changed abruptly, and we were trying to find out how to meet that situation.

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(Tr. p. 827)

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Q. Mr. Morgens, I would like to return just a moment to this Erie County, Pennsylvania situation. When those price reductions that are shown in the ad were given, those were price reductions to the consumer, were they not?

A. Yes, that's right.

Q. And they would buy it for seven cents, or five cents cheaper in the store?

A. That's correct.

Q. Now, were any price concessions given to the dealers and distributors?

A. No, there were not.

Q. They were receiving less money for the product, from the consumer?

(Tr. p. 828)

A. Well, let me make this clear. The merchandise was sold to the dealer at a lower price, the equivalent of what he could pass on to the consumer, if that's what you mean. But there was no special consideration to the dealers other than that. You can't persuade the dealer to sell at seven cents off, or five cents off, or three cents off, and have the amount come out of his pocket.

Howard Joseph Morgens—Direct

Q. So the ultimate loss of seven cents, five cents and three cents was borne by The Clorox Company? A. Yes.

Let me make it clear about that experiment, however: That doesn't involve any increase in Clorox expenditures for advertising or promotion. That's an experiment of a different way to spend—that has to come out of the newspaper, or some other area, or some other media, to determine if that is a more effective way to spend the Clorox money than the way the Clorox Company had been spending it. There is never any increase in expenditures because of this type of activity.

Q. Well, that restriction hasn't been placed on other P & G products, has it? A. By and large that is what we do. We are spending no more money on Clorox per unit than the old Clorox Co. spent, and the management has to determine—the Clorox management has to determine whether that type of expenditure is more effective

(Tr. p. 829)

than something else that The Clorox Company was doing.

Q. Yes, that's what you are doing, but my question is, sir, that restriction has not been placed on other P & G products? A. On products that aren't new, yes. On new products you haven't yet arrived at a budget, or a budget basis, or a going rate of expenditures. On your existing brands there is no new appropriation for a promotion.

Q. What distributor of The Clorox Company was involved in this Erie, Pennsylvania situation? A. I don't know his name.

Q. Would he be the one located closest to Erie geographically? A. I would assume he was, yes.

Howard Joseph Morgens—Direct

Q. Mr. Morgens, 70 per cent of the volume of the P & G household products comes from products which were not in existence 12 years ago, doesn't it, approximately?

A. Approximately.

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(Tr. p. 830)

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Q. I think I asked you the other day, sir, if you recalled being interviewed by the Business Week people, at the time we put the cover off of Business Week in the record.

A. Yes.

Q. I would like to ask you a question now, sir, concerning a statement which allegedly was made by yourself; and to meet any objection that has been made previously I will hand you the statement. You can use it to refresh your memory, or any other way you desire. You—

* * * * *

By Mr. Tincher:

Q. And I will read to you the statement, sir, and ask you if it is correct:

"We intend to keep fighting for greater shares of the market for every product. Any time you think you can do otherwise the company starts to slip. Competition is still severe in these fields. If you stand still, you go down."

Now, I ask you, sir, if you are accurately quoted as having made that statement? A. I don't know whether I was accurately quoted or not, but I will say any time we don't keep fighting for greater share of market, we are in trouble; and I would like to elaborate on

(Tr. p. 831)

that by saying we have been fighting pretty hard for a greater share of, say, the packaged-soap market, for the

Howard Joseph Morgens—Direct

past five or six years, and we have lost share while we are fighting for a greater share.

Q. And you have been competing with Colgate-Palmolive-Peet and Lever Bros., have you not, sir? A. We have been competing with the whole industry.

Q. And you recognize that those two concerns have sales of at least \$250,000,000 a year, do you not? A. I don't know what their sales are, but I assume it is in that range. But we are competing with far more than they. I am not sure that they have gained share of market in the last five or six years.

My point is that I think everybody—this statement could be made by anybody, large or small, in the industry—that they are fighting for a greater share. Whether they achieve it or not and are successful in winning it or not is quite a different matter than saying they are going to fight for it.

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(Tr. p. 840-A)

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Q. Mr. Morgens, the product Comet is sold by P & G's Case Goods salesmen, is it not? A. That's correct.

Q. And these salesmen were selling soaps and detergents, Spick and Span, prior to the introduction of Comet?

A. That's correct.

Q. Now, can you tell us what P & G executives or high staff personnel have been transferred to the Clorox Company subsequent to the acquisition? A. Yes, I can.

There were three men transferred to The Clorox Company. One was Mr. Fred Brown, who became executive vice-president of The Clorox Company, and was the man who was the active manager of the business in San Francisco. He, in effect, handles the duties which Mr. Roth,

Howard Joseph Morgens—Direct

who was president of the old Clorox Co. handled. Mr. Roth was at an age where he wished to retire. He is not retired, in the sense that he is still a very active consultant to us, and he comes to the office every day; but, nevertheless, he doesn't have the heavy responsibility of the business on his shoulders anymore, in accordance with his wishes.

The other two gentlemen, one is Mr. Richard Oster, who is a young man, 33 or 34 years old, who was sent out, who has a marketing background, and is called staff associate for

(Tr. p. 840-B)

marketing, or maybe it is marketing staff association.

The other is a man named Rex Fink, who became staff associate for manufacturing. He has a manufacturing background.

Those last two men went in a staff capacity, advisory capacity. The main operating channels are directly from Fred Brown to the other officers of the company who are fulfilling the same function that they fulfilled under the old Clorox Chemical Co. management.

(Tr. p. 841)

* * * * *

Q. Do the distributors who sell Clorox sell other products, also? A. Most of them do. Maybe all of them do, but most of them do. I haven't made a detailed check.

Q. Are P & G salesmen allowed to sell any product that isn't a P & G product? A. No, they are not.

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(Tr. p. 842)

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Q. Now, can you tell us, sir, the profit area of the distributor? In other words, as I understand it he buys the

Howard Joseph Morgens—Direct

product from The Clorox Company, and then he sells it to the consumers—not to the consumers, but to the dealers, the grocers and others. A. Yes, he buys from The Clorox Company, the Clorox Company bills the distributors, the distributor sells that merchandise to the retail and wholesale outlets, in his area; he takes the credit risks, and he collects the money from the retailers and the wholesalers in his area.

The Clorox Company has only 88 customers, in fact.

Q. And the average profit for the distributor on Clorox is around seven percent, is it not?

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(Tr. p. 843)

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A. It is not as high as seven percent. It's between six and seven percent. I should know that figure. I think it is $6\frac{1}{4}$, but I really don't know.

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(Tr. p. 844)

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Q. Now, the distributor, then, has his own salesmen who call on the trade that sells Clorox as well as the other products of the distributor. Is that the way the Clorox gets to the selling level, the retail selling level? A. The distributor has his own salesmen, that is true, yes.

Q. Now, does The Procter & Gamble Company have a quantity discount price structure? A. For what?

Q. For its products. Let me explain what I mean. A system whereby purchaser of P & G products—

(Tr. p. 845)

Hearing Examiner Haycraft: Well, let's try to hold this down if we can. I've about crystallized in my mind

Howard Joseph Morgens—Direct

that the soap—or the grocery items, the soap products, or the Soap Division, soap, detergents and cleansers are sufficiently comparable in nature and all that to make a comparison of marketing practices. I've asked you to keep out of the drugs. But I do think you've demonstrated that your soap business, that is, the soaps, detergents and cleansers are sufficient.

Now, you may answer the question along that line with respect to those items, whether you have a quantity discount.

* * * * *

Go ahead, you may answer the question.

A. Yes, we have a quantity discount structure on soap.

By Mr. Tincher:

Q. And under that structure your retail grocer customers may lump together all different—the total amount they spend for each brand, and get a quantity discount on the total amount they spend for all P & G products, may they not?

(Tr. p. 846)

A. Yes.

Q. And has Clorox been included in that quantity discount? A. It has not.

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(Tr. p. 847)

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Q. Now, when you're selling a product and you use distributors rather than salesmen, you lose direct contact between yourself and the customer, do you not, as far as that product is concerned? A. I guess you could say you would, yes. You'd lose it in the sense of being direct. But you think of your distributor's salesmen in the sense

Howard Joseph Morgens—Direct

of working for you, and in that sense you don't lose contact.

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(Tr. p. 852)

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Q. Now, who in the P & G organization has charge of advertising with reference to Clorox? A. The advertising manager of The Clorox Company is this man whose name I forgot in Monday's testimony, Mr. Shaver.

Q. There's nobody in P & G that's supervising Mr. Shaver or checking on him or determining how he advertises? A. Mr. Shaver reports directly to Mr. Fred Brown who is executive vice president of The Clorox Company, and Mr. Brown reports directly to me.

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(Tr. p. 854)

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Mr. Tinch: Now let me mark for identification, please, as Commission's Exhibit Number 340 the February, 1958, edition of Good Housekeeping Magazine, and I assure the Examiner that I will tear out the pages I am concerned with.

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(Tr. p. 855)

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Mr. Royall: Your Honor, may I comment. This is, I think, the first piece of evidence that's been introduced covering a period since the institution of the proceeding. There may be others. If there were, they escaped my notice. What is your Honor's ruling as to—

Hearing Examiner Haycraft: Well, there's been considerable testimony. I take testimony right up to the time of the hearing.

Howard Joseph Morgens—Direct

Mr. Royall: The conclusion of the evidence?

Hearing Examiner Haycraft: Yes.

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(Tr. p. 862)

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By Mr. Tinch:

Q. Mr. Morgens, when you were telling us about this \$50,000-a-year annual saving for newspaper advertisements by lumping together P & G products for discount rates, do you have reference to such an issue of a magazine as Commission's Exhibit 340 which you've been shown?

A. In the first place, you mentioned newspaper advertisements. I'm sure you meant magazine advertisements.

Q. I beg your pardon. I did mean magazine, of course.

A. I don't know whether there is a discount for a number of

(Tr. p. 863)

advertisements in a specific issue of Good Housekeeping. I know that there are discounts on magazine advertising in quantity, but they might be placed—might be discounts for the amount of advertising placed in the publication over the period of a year, for example.

Q. You do know that Good Housekeeping is one of the magazines that gives such discounts, though? A. No, I don't know that, but I know that the magazine advertising Clorox places now can be purchased for \$50,000 a year less than would be the case if the old Clorox Chemical Company had placed that magazine advertising. That's all magazines—

Q. Right. A. —over a period of a year.

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Howard Joseph Morgens—Direct

(Tr. p. 865)

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Hearing Examiner Haycraft: If I've correctly understood the testimony, that isn't possible. Is it possible to make a saving on your Clorox by putting it in national advertising rather than in television?

The Witness: Well, I'd have to look at the specific—there's no—

Hearing Examiner Haycraft: You said it was the reverse.

The Witness: On talent there's no saving. On spots I am told that the smaller companies, including Clorox, can buy spots—spot television messages more cheaply than can Procter & Gamble. On programming—and maybe I'm going contrary to my own counsel's objections here—

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(Tr. p. 866)

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The Witness: The number of messages on an individual program doesn't make much difference, as I see it. For example, we share and a great many other advertisers share programs with other manufacturers. You can see that on television every night, that a cigarette company will advertise cigarettes on the opening commercial, and you might say somebody like Procter & Gamble could advertise its message on the closing commercial in that program. They have what they call alternate sponsors that sponsor between different companies. There's nothing that we do on television that I can see that the old Clorox Company couldn't have done.

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(Tr. p. 868)

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Howard Joseph Morgens—Direct

By Mr. Tincher:

Q. Mr. Morgens, inside P & G, advertising is something of a science tied closely to research and development and to production and marketing, is it not? A. Mr. Tincher, I wish it were.

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(Tr. p. 869)

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Q. Well, you say that it hasn't become a science. Let me ask you—— A. Oh, it's far from it. So far from it that I hardly

(Tr. p. 870)

know how to answer your question.

Q. Well, is that one of P & G's objectives to so tie in your advertising with the other divisions of the business as I indicated in my question? A. Well, it's our objective as it is any advertiser's objective to coordinate the various activities in the business, and it's certainly an effort we make to eliminate guesswork and the amount that you must rely on creative abilities and imagination, but I just wish we were that good. We're not.

Q. All right, sir. A. We make lots of mistakes, Mr. Tincher.

Q. Now, when you say you make lots of mistakes, sir, do you mean to tell me that occasionally you have campaigns where you'll spend a lot of money and still the product won't go over and you'll lose money? A. Each brand, let me repeat, is run as a separate business. We don't lose any money that we have to, but sometimes a brand curls up and dies, and we let it die rather than to lose money. And a lot of it is due to human error. I'm not too old in the business, but when I was selling soap I could

Howard Joseph Morgens—Direct

name, I imagine, ten brands that I was then selling which are dead today; they're just dead.

Hearing Examiner Haycraft: Isn't that due a great deal to the changing habits of the people?

(Tr. p. 871)

The Witness: Well—

Hearing Examiner Haycraft: They just don't use soap any more for laundry purposes? I mean bar soap?

The Witness: A lot of that is due to—

Hearing Examiner Haycraft: The invention of the automatic washer?

The Witness: Well, if we were skilled in predicting or scientific in predicting these changes, we could adjust our products and our advertising to the trends. We're not sufficiently skilled to do that.

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(Tr. p. 876)

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By Mr. Tincher:

Q. Mr. Morgens, in recent years the P. & G Company has won awards, on two occasions, from the American Institute of Management, as the best-run company in the United States, hasn't it?

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A. Yes, we have.

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(Tr. p. 885)

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Q. Mr. Morgens, the sales pattern of household liquid bleach

Howard Joseph Morgens—Direct

(Tr. p. 886)

is higher in the spring and fall than the rest of the year, isn't it, for spring and fall housecleaning? A. We run spring and fall housecleaning promotions, as I understand it. I think the general pattern is that the sales tend to buck up in the summer months——

Hearing Examiner Haycraft: For deliveries in the fall?

A. (Continued). The sales seem to buck up in the summer because there are more white clothes worn in the summer and more frequently washed in the summer than they are in the winter. But the household part of it, the spring and fall housecleaning refers to its disinfectant use which has nothing to do with its use, of course, as in the washing machines.

By Mr. Tincher:

Q. Cleansers are also featured in the spring and fall housecleaning sales, are they not, sir?

Mr. Royall: I believe I object to that, your Honor.

Hearing Examiner Haycraft: Overruled.

A. Cleansers, or cleaners?

By Mr. Tincher:

Q. Cleansers, sir. A. Cleansers. Yes. Spring housecleaning, anything that is used to wash woodwork, floors and clean up a house generally is part of spring housecleaning time.

Q. That would include P & G's products Comet and Spic and Span,

(Tr. p. 887)

would it not, sir? A. That's right. I don't know whether we use those in our spring housecleaning plan or not, but it would seem a desirable time to do so.

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Howard Joseph Morgens—Direct

The Witness: Your Honor, could I say something?

Just before lunch I suggested I'd like to check during the lunch hour on my statements about the distributor's organization and profit, and report back to you after lunch, and you gave me that privilege.

Hearing Examiner Haycraft: Yes.

The Witness: I'd like to say the distributor's profits are between six and seven percent based on a suggested selling price to the retail and wholesale trade.

I'd like to say further that although there is a suggested selling price, the distributor is in no way bound and there is no agreement in any way that he must sell at any particular price.

I would further like to say that is precisely the same plan as used by the old Clorox Chemical Co.

Hearing Examiner Haycraft: You haven't made any change.

(Tr. p. 888)

The Witness: We haven't made any change.

And if it's agreeable to you, there was so much discussion about the distributor organization I would like to say one other thing, if it's all right, and that is that we believe that this distributor setup we have is an excellent distribution system. We have no plans whatsoever for changing it. It has been successful. And we don't advance by tearing apart anything that has been as successful as that has. Our thoughts are more to build it rather than to change it in any way.

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By Mr. Tincher:

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Q. How many salesmen does P & G have altogether?

A. I'm sorry, I can't give you that figure either.

Howard Joseph Morgens—Direct

Q. Could you give us an approximation?

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(Tr. p. 889)

A. Something around 1800. It may be a little higher than that, but that is domestic.

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(Tr. p. 891)

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Q. Now, do customers of Clorox, do they receive advertising allowances or allowances for in-store promotions?

Hearing Examiner Haycraft: Do you mean retail?

Mr. Tincher: Yes, sir.

A. The Clorox Company has continued the same plan that was used by the Clorox Chemical Co., which is a payment for special featuring in newspaper, handbills, special positions in the store.

By Mr. Tincher:

Q. And does—Is that payment handled directly between the retail grocer and The Clorox Company, or is it handed down through the distributor, then down through the grocer? A. My understanding is it is passed on to the retailer by the distributor.

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(Tr. p. 892)

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Q. Comet does have a bleaching agent in it?

Hearing Examiner Haycraft: That's what it said, bleaching agent. I think it said chlorination, the word chlorination.

A. I can't quite pull the word out. I think it's perborate. Perborate bleach.

Chlorinated trisodium phosphate.

Howard Joseph Morgens—Direct

By Mr. Tincher:

Q. And is this the same thing that is in the Oxydol that has the bleach in it?

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(Tr. p. 893)

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A. I don't know what the technical term is for the type of bleach that is placed in Oxydol.

By Mr. Tincher:

Q. You just know there is a bleaching agent in Oxydol, in a certain type of Oxydol?

* * * * *

Hearing Examiner Haycraft: On the record.

His answer is no to the last question.

Now, go on and explain what kind of bleach it is, Mr. Morgens.

The Witness: It's a perborate bleach.

(Tr. p. 894)

By Mr. Tincher:

Q. Now, is what is known as a dry bleach a perborate bleach? A. My understanding of a dry bleach is there are several different kinds. Some of them are perborate; others are not.

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(Tr. pp. 897-898)

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Hearing Examiner Haycraft: On the record.

Commission's Exhibit 342 for identification, which has been offered in evidence, is a Procter & Gamble domestic advertising and sales promotion on all brands, and it is to be received in evidence, in camera.

611a

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(The document referred to, heretofore marked Commission's Exhibit 342 for identification, was received in evidence, IN CAMERA.)

(Tr. p. 920)

Courtroom No. 1, Room 805
United States Post Office and
Courthouse
Cincinnati, Ohio

February 6, 1958

Met, pursuant to adjournment, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

* * * * *

(Tr. p. 922)

PROCEEDINGS

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(Tr. p. 945)

* * * * *

Mr. Tincher: And, Mr. Examiner, I would like to have marked as Commission's Exhibit Number 348 for identification, and as A the front cover of November, 1956 issue of Moonbeams; and as Commission's Exhibit 348-B and C, and, also, sir, we would offer the reverse side of Commission's Exhibit 348-A. I have already assigned B and C—

Hearing Examiner Haycraft: You haven't given the page numbers.

Mr. Tincher: Oh, I beg your pardon. It's Pages 4 and 5, remarks by Mr. Dupree, chairman of the board.

Hearing Examiner Haycraft: And what do you want for D, then?

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Mr. Tincher: The reverse of A, then.

Hearing Examiner Haycraft: Is that Page 1?

Mr. Tincher: It's Page 2, the inside page of the cover.

Hearing Examiner Haycraft: Page 2.

Mr. Tincher: Yes, sir.

(The document referred to was marked Commission's Exhibit 348-A, B, C and D for identification.)

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(Tr. p. 946)

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(The document referred to, heretofore marked for identification Commission's Exhibit 348-B, C and D, was received in evidence.)

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(Tr. p. 972)

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Mr. Deveny: 372-A through D.

(The documents referred to were marked Commission's Exhibit 372-A, B, C and D for identification.)

Hearing Examiner Haycraft: What's the date?

Mr. Deveny: This letter is dated July 6, 1956, entitled To Our Distributors, signed by Mr. Shaver, Advertising Manager, of whom we have heard before.

Hearing Examiner Haycraft: Commission's Exhibit 372-A to D will be received in evidence.

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(Tr. p. 973)

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Mr. Deveny: I would like to have marked for identification as Commission's Exhibit 374-A through C a letter

Proceedings

from the Clorox Chemical Co., dated July 20, 1956, signed by Mr. Shaver, directed to Gentlemen.

(The document referred to was marked Commission's Exhibit 374-A, B and C for identification.)

Hearing Examiner Haycraft: Well, there are a lot of gentlemen. Is it to the trade, or distributors, or whom?

Mr. Deveny: Apparently this, again is—

Hearing Examiner Haycraft: Promotional?

Mr. Deveny: A promotional piece going to the distributors. There is attached to this a suggestion for bulletin to be mailed by the distributor to the trade contacts,

(Tr. p. 974)

so I think that pretty well defines what the purpose is.

I would like to offer Exhibit 374 at this time.

Hearing Examiner Haycraft: Commission's Exhibit 374-A to C for identification is received in evidence.

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Mr. Deveny: Your Honor, I would like to turn now to another portion of Clorox Chemical Co.'s method of doing business. We have a series of letters, photostats thereof, from apparently two or three gentlemen that may have been salesmen with The Clorox Company, as I understand it, to Mr. Trimpe, Vice-President of the Clorox Chemical Co. These letters concern competitive information that the salesmen have noted while making trade contacts with distributors as set forth in the bodies of these letters. And, again, we've cut this down to a representative view.

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(Tr. p. 976)

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Proceedings

Hearing Examiner Haycraft: It depends on what it is to be used for, Mr. Royall.

I'd like to have counsel indicate what the purpose of this is.

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Mr. Deveny: I say to begin with we have to look at certain competitive elements in the market, the relative line of commerce. These are certainly firsthand reports, and firsthand details of what competitive elements and factors are taking place in the market prior to the acquisition. I think this is necessary to compare with the merchandising ability and experience of Procter & Gamble in order to determine what sort of a market setup and competitive elements are going to enter into the picture after the acquisition. And I think—I could be corrected—I imagine when we get to California we'll probably tie these things in a little more

(Tr. p. 977)

directly than they are now. We would like to have them in evidence at that time.

Hearing Examiner Haycraft: Well, if you're going to offer them in evidence to establish a fact as to the existence of a certain type of competition, they are, of course hearsay. They are the opinions, impressions of a group of salesmen based entirely upon what they in turn were told or what they observed.

* * * * *

Such letters sometimes are received in evidence in proceedings before the Federal Trade Commission and courts and anti-trust cases where you're trying to establish the effect that may grow out of a competitive practice, such as boycott, or something of that nature.

Mr. Royall: State of mind.

Proceedings

Hearing Examiner Haycraft: State of mind.

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(Tr. p. 978)
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Now, Procter & Gamble didn't create any state of mind. It isn't a Section II or III case. They bought a concern which was not even a competitor at the time they bought it. So there couldn't be any situation where a competitive effort put on by the respondent may have caused this thing to occur.

In other words, what I have in mind is suppose that Procter & Gamble had been in that industry, and had used methods to drive this competitor out, and then bought him out. Then you might have some evidence to show what Procter & Gamble had done in the industry. But Procter & Gamble wasn't even in that industry. They are going into the industry by the acquisition of this concern.

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(Tr. p. 1015)
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Mr. Royall:

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(Tr. p. 1016)
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We furnished the other day Exhibits 323 and 324 to counsel supporting the complaint with the thought that Mr. Morgens would be examined about them. In fact, 324 was not called for by the subpoena, but was given because that type of information had been suggested in another paragraph, but not sufficiently to cover this.

I want to call attention to your Honor, if he should be interested in reading any of the exhibits at this time, that Mr. Morgens was ready, and was previously stated to be

Proceedings

ready, to testify as to those exhibits, and is ready now if desired.

Hearing Examiner Haycraft: I assume those exhibits speak for themselves.

Mr. Royall: No, sir. I mean they do not quite speak for themselves, and I anticipated an examination. I, of course, could not examine him on them. But I want to show the Government Counsel that, although they didn't see fit, and they had that right, to call Mr. Morgens, we intend at the proper time to produce evidence explanatory of those documents and their background.

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(Tr. p. 1022)

Room 261
United States Post Office
Seventh & Mission Streets
San Francisco, California

April 14, 1958

Met, pursuant to adjournment, at 10 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

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(Tr. p. 1024)

PROCEEDINGS

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(Tr. p. 1028)

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Fred A. Brown

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Fred A. Brown—Direct

Hearing Examiner Haycraft: Give your full name to the Reporter.

The Witness: Fred A. Brown.

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(Tr. p. 1029)

DIRECT EXAMINATION

By Mr. Tinch:

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Q. Would you tell us your present position, sir? A. My present position is the Executive Vice-President of The Clorox Company, and I report directly to Mr. Morgens, the President of Procter & Gamble Company.

Q. How long have you held that position, sir? A. I came out here on August 4th last year, 1957.

Q. Approximately three days after the acquisition of The Clorox Chemical by Procter & Gamble? A. That's correct.

Q. What were you doing prior to your present job, sir? A. Well, I am in my forty-fifth year in the Procter & Gamble Company, and during all of that time my experience has been in the manufacturing end of the business.

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(Tr. p. 1031)

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Q. All right, sir. Now, as a manufacturing executive, what has been and what are your duties with The Clorox Company? A. My duties are, as the title indicates, the executive vice president, to be responsible to Mr. Morgens for the management of The Clorox Company.

Q. In all phases? A. In all phases of the business.

Q. Now, during your experience with Procter & Gamble from the manufacturing viewpoint have you been in

Fred A. Brown—Direct

charge of the manufacture of soaps, detergents, and cleanser products? A. I have, yes, sir.

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(Tr. p. 1032)

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Q. Now, as an official in charge of manufacturing, is it one of your normal duties to see that manufacturing is conducted as efficiently as possible and that economics of operations takes place wherever possible? A. That's true.

Q. And is that one of the reasons you were placed in your present position with The Clorox Company, because of your experience? A. I don't think that was a major part of the decision, sir.

(Tr. p. 1033)

Q. It was only a minor part? A. Well, I really can't read the minds of the people who made the decision, but I would suspect that they thought it might be better to have an older man in this position. They maybe thought of other reasons, thought there would be other reasons, as to my being a proper person to come out here to manage the office or the business.

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By Mr. Tincher:

Q. Now, if I may— A. I will tell you why I say that, Mr. Tincher, because manufacturing in The Clorox Company is a relatively simple process as compared to the manufacture in the Procter & Gamble Company and that is the reason I say I don't think that was the major reason why I was selected to come out here.

Q. In other words, the manufacturing of liquid bleach is a very simple operation? A. The manufacture of liquid bleach is a simpler operation than soap.

Fred A. Brown—Direct

Q. And quality control is much easier? A. Well, I think quality control is quality control in any field, and you have to do whatever you have to do to have the best product you want to make.

(Tr. p. 1034)

Q. Yes, sir. Now, in response to my question, though, quality control in liquid bleach is easier than quality control in soaps and detergents? A. Well, I think that is probably correct insofar as the manufacturing is less complicated, yes.

(Tr. p. 1035)

Q. I asked you if Mr. Morgens or anybody else at P & G set any policy or objectives for you, either sales goals or production, price, any type of thing, and you said no. So I think it would be logical to ask you if you are completely on your own in determining the production and the sales and the policies of The Clorox Company. A. Well, naturally Mr. Morgens looks to me for recommendations and as to what should be done in the best interests of furthering the business. And in his capacity as president I naturally consult with him about many of the major decisions that are made before putting them into effect. But he does look to the management of The Clorox Company to be completely responsible for the volume of the business, the profits of the business, and all of the areas of the business that con-

(Tr. p. 1036)

tribute to that.

Q. All right, sir. Now, at the staff level what personnel have you been provided with from the P & G Company to

Fred A. Brown—Direct

help in The Clorox Company? A. I brought out with me at the time I came a man, Mr. Dick Oster, Richard Oster.

Hearing Examiner Haycraft: How do you spell that?

The Witness: O-s-t-e-r. Mr. Oster's present position is marketing staff associate. He has no line responsibility in the organization, but he reports directly to me.

I also brought out a man by the name of Rex Fink, whose position is manufacturing staff associate, and he also has no line responsibility but is directly responsible to me.

We also brought in a man by the name of Melrose who has responsibility for the chemical side, that is, the laboratory controls and the things that have to do with the

(Tr. p. 1037)

technical side of the business. We have—that is all that I brought out at the time of the acquisition. Those were the only three people that came into the company at that time.

By Mr. Tincher:

Q. All right. So that was around August 3rd when he came? A. That's right.

Q. How about from August 3rd to the present time?

A. The only man that has been added, a Procter & Gamble man, as I recall, is Mr. William Young, who was in the sales department of the Procter & Gamble Company. The Clorox Company for some time past has been creating sales divisions in their organization. They had an objective of five divisions. At the time I came out here only two of those positions had been filled. We have since filled the other three positions and now have five division, sales divisions, each with a division sales manager, each headed by a division sales manager, and one of those men

Fred A. Brown—Direct

was a Procter & Gamble man who was the district manager of the San Francisco District Office, who was made available to me to fill one of the five division sales positions.

Q. That is Mr. Young? A. Mr. Young, Mr. William Young.

Q. What division does he head up? A. He is in the Pacific Coast Division.

Q. You spoke of five divisions. You mean five geographical?

(Tr. p. 1038)

A. Five geographical divisions. Would you like me to name those?

Q. Yes, why don't you while we are on the point. A. Well, we have an Eastern Division, a Central Division, a Southeastern Division, a Southwestern Division, and a Pacific Coast Division.

Q. I take it Mr. Young is one of those five? A. He is one of those five division managers.

Q. Now, what are his duties and responsibilities? A. Well, he has the same duties and responsibilities of all five of the division sales managers, and he works with the distributors in a sort of auditing capacity as to how they are promoting the brand Clorox to be—he endeavors to be helpful in suggesting to them whatever might be helpful in the furtherance of the brand at the retail level. But it is all in a rather advisory capacity, and we, of course, don't get into the actual running of the distributors' business. It's strictly their business. But we do try to be helpful in advising them where we can and where we think it will be of benefit to the Clorox business.

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(Tr. p. 1040)

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Fred A. Brown—Direct

Hearing Examiner Haycraft: The sales managers you are talking about, each one of them has salesmen under him, or is he the only one?

The Witness: He is the only one. The retail salesmen are all employees of the distributors, not of Procter & Gamble Company.

(Tr. p. 1042)

By Mr. Tincher:

Q. Let's return to Mr. Oster. What was his background with the Procter & Gamble Company? A. It was all in the advertising end of the business.

Q. And what products especially, or was it just general? A. I am sorry, I am not quite clear on that. I think he was what they call a Division Brand Manager. Under him were, he was responsible for, several brands. I happen to remember that at one time, I think that Tide was one of his brands.

Q. Was he one of the persons who were originally in charge of the introduction of Tide when it first came out?

(Tr. p. 1043)

A. I can't answer that. I don't know.

Q. How long has he been with the company? A. Approximately ten years.

Q. Now, the same question as to Mr. Fink. A. Mr. Fink, all of his experience was in manufacturing prior to his coming out here. He worked in various chemical work, as a Chemical Supervisor in the factory, and as a production Supervisor, and his last position with the company was as, he was the Chemical Engineer of the Ivorydale factory at Ivorydale, Ohio.

Fred A. Brown—Direct

Q. What is produced at that factory, sir? A. Oh, most of the products manufactured by the Procter & Gamble Company, soap and edible products. It does not include, of course, some of the products of the later acquisitions.

Q. Has the manufacturing personnel of the old Clorox Chemical Company been retained? A. All of them, without exception.

Q. The same, sir, for the sales personnel? A. That is true.

Q. The same for the advertising personnel? A. That is correct.

Q. The same advertising agency? A. The same advertising agency.

Q. Any changes at all that you can think of?

(Tr. p. 1044)

A. That have been made?

Q. Yes, sir. A. Mr. Wolford, the Executive Vice-President of the old company, retired at the time I came out here, and that had been planned before the acquisition, his retirement. He had reached retirement age before the acquisition. He was the Executive Vice-President. And I am sure that you know that Mr. Roth, who was the President prior to my coming out, is now in a consulting capacity and not active in the business; but he is in the office every day for consultation.

Q. Except since he has become sick, of course? A. That is right; except his illness, and of course when he is away on vacation.

Q. And that is about all changes that you can think of? A. Those are the only changes, Mr. Tincher, that I can recall.

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Fred A. Brown—Direct

(Tr. p. 1045)

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Q. All right, sir. Has there been any change in the manufacture, either in the location, in the amount or the technique of manufacture? Those are three separate questions, if you want to consider them as such. A. Do you want to take them one at a time, Mr. Tincher?

Q. Yes. A. In the location, the Seattle plant was disposed of by the Clorox Company before the acquisition. We have closed the Clorox plant that was located in the Kansas City, Missouri, location, and that production is now being manufactured in the Kansas City plant of the Procter & Gamble Company.

(Tr. p. 1046)

I might expand on that for a minute, if you will permit me to. We happened to have in the Kansas City area, and within the confines of the Procter & Gamble property lines, a building that was not being used and was suitable for the manufacture of Clorox, and it seemed to us that it would be a wise thing to do, to rather than manufacture, have two plants operating in the same area, to combine that production into the one plant.

Q. What happened to the old plant there at Kansas City, sir? A. It is closed down and is vacant.

Q. Has it been sold? A. No.

Q. Do you know whether or not it is going to be used by the Procter & Gamble Company to manufacture private labels of chlorine bleach? A. It wasn't, it has not been, used up to this time, and I know of no plans for it to be used.

Q. All right, sir. Continue. A. We also closed down the Boston plant. We did that because, I am told, at the time that plant was built it was in the thinking of the old

Fred A. Brown—Direct

Clorox Chemical Company that if and when the distribution of Clorox were expanded in the eastern part of Canada, that that territory would be supplied by the Boston area. That did not develop and we had ample facilities in the Jersey City factory for supplying that area,

(Tr. p. 1047)

and it was the judgment at the time, our judgment at the time, it was quite likely that that territory could be supplied more economically—I am talking about the Boston territory—from the Jersey City plant than by supplying it from two plants—I mean supplying the whole eastern territory from those two plants. Well, I will have to correct that. I don't mean the whole eastern territory; I mean the territory that was normally the Jersey City plant territory and the Boston territory. Our experience, however, has told us that that judgment was wrong, and the Boston plant is now being reactivated and is getting back into production.

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(Tr. p. 1049)

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By Mr. Tincher:

Q. Now, is the Clorox Company giving 6¢ per case allowance at the present time? A. Yes. We give universally what we call a D.C.M. allowance to all our distributors.

Hearing Examiner Haycraft: What does D.C.M. mean?

(Tr. p. 1050)

The Witness: Dealers' Cooperative Merchandising.

By Mr. Tincher:

Q. And is the Clorox advertising being handled on a nationwide basis by the company rather than the distribu-

Fred A. Brown—Direct

tors handling it? A. Well, excepting for the advertising that comes under the D.C.M. allowance, if you call that advertising, the plans of the Honig-Cooper—the plans of the advertising is all handled by the Honig-Cooper Agency, and they have recently acquired the Miner Company of Los Angeles. I have been told they have been the old agent of the Clorox Company since 1925.

Q. Now, does the Clorox Company equalize freight costs, or does the company charge the actual freight to its distributors? A. National distribution is a uniform pricing structure which includes a uniform freight.

Q. So all distributors pay the Clorox Company the same amount for the bleach they buy? A. The list price is the same to all distributors.

Hearing Examiner Haycraft: Delivered price?

The Witness: Beg your pardon?

Hearing Examiner Haycraft: Delivered price, to their door?

The Witness: Yes, it is a delivered price to the

(Tr. p. 1051)

distributor, and then the Clorox Company also pays the freight to the warehouse of the chain and to the wholesaler's warehouse, but we do not pay the freight beyond the warehousing freight to the retailer, the retail store.

By Mr. Tinch:

Q. And then are the distributors supposed to suggest retail sales prices to their customers so you have a uniform national Clorox price?

A. We sell to our distributors at a uniform price and suggest to the distributors a resale price.

Fred A. Brown—Direct

Hearing Examiner Haycraft: And that is uniform also?

The Witness: That is uniform.

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(Tr. p. 1052)

By Mr. Tincher:

Q. What is the current suggested retail price for the Clorox bleaches in pints, quarts, gallons and half gallons, sir? A. Well, I can quote you our price to the distributors. I am not sure I can quote you the suggested resale prices. On quarts our price to the distributor is \$1.79, and we suggest a resale price of \$1.91. Now, that is our major size. I don't try to remember the other sizes, and I don't want to quote them because I am not sure of them. I can tell you our price to the distributor in every case if you want that.

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(Tr. p. 1053)

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Q. All right. What effort is made to see that that is the price at which they sell it? A. Certainly it is our policy and our desire that they sell at that suggested price.

Q. And how do you implement that policy and carry it out? A. Well, we haven't had any need to do so.

Q. They have automatically done it? A. That's right. I know of no cases since my coming, with Clorox, of any difficulty in that area. There has been no case where we have had to do any urging on the point.

Q. I take it, then, the distributors have been most cooperative. A. Very cooperative.

Q. And the difference between \$1.91 and the \$1.79, does that represent the distributor's profit margin? A. Well, there are also discounts, Mr. Tincher, both quantity and cash discount.

Fred A. Brown—Direct

Q. To the distributor? A. To the distributor, which he passes on to his direct buyers.

Q. Does he pass them on entirely, or do you know?

A. To the best of my knowledge, entirely.

(Tr. p. 1054)

Q. All right, sir. I take it approximately the same difference between your price to the distributor and the suggested sales price by the distributor would prevail on the other sizes of Clorox? A. Approximately.

Q. Now, do you have a suggested retail price for this bleach, and by that I mean— A. All the relations with the retail level are in the hands of the distributors. The distributors take title. We have 84 customers in the United States, and they are all our distributors. We sell our products to them. They pay us for them and take title to the goods and from there on they have their relations with the trade.

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(Tr. p. 1056)

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Q. Have there been any price increases to the distributor this year, sir?

(Tr. p. 1057)

A. Not this year, no, sir. You are talking of this calendar year?

Q. Right. 1958.

Does The Clorox Company still allow its distributors a 2 per cent cash discount? A. That's correct.

Q. Are you familiar, sir, with the sale of liquid bleach in Erie, Pennsylvania, during November and December of 1957? A. I have some very general knowledge of it, yes, sir.

Fred A. Brown—Direct

Q. You are aware that clorox liquid bleach was offered at that time at three, five, and seven cents off on quarts, half gallons and gallons respectively? A. I am.

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(Tr. p. 1058)

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Q. Mr. Brown, let me hand you what we have marked as Commission's Exhibit 395 for identification, and I will ask you—well, at the same time I will show you Commission's Exhibits 337, 338, and 339, and I will tell you that Mr. Morgens testified that these were used in Erie, Pennsylvania.

Mr. Royall: What are the numbers of those?

Mr. Tincher: 338, 337, and 339.

By Mr. Tincher:

Q. Mr. Morgens has testified that these three were used in Erie, Pennsylvania. I will ask you if the exhibit I have just given you, 395, was not used in conjunction with these three. A. I can identify the labels as having been used, Mr. Tincher, but I have not seen this detail of the display promotion.

Q. Do you recognize— A. I would imagine it's probably correct that this was used, but I haven't—I really didn't see it before it was used. I didn't get into that much detail with the promotion. But I can identify the label.

(Tr. p. 1059)

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Q. Now, Mr. Brown, may I ask you whose decision it was to lower the price of clorox bleach in Erie, Pennsylvania, by three, five, and seven cents on the respective size bottles? A. Well, it was really the decision of our management

Fred A. Brown—Direct

(Tr. p. 1060)

committee of The Clorox Company.

Q. And who is that, sir? A. That consists of the four operating vice presidents: Messrs. Montgomery, in charge of manufacturing, vice president in charge of manufacturing, rather; Towers, treasurer; Trimpe, sales; and Matson, traffic; Mr. Oster, Mr. Fink, myself and Mr. Roth is an ex-officio member.

Q. Are any of the gentlemen present in the courtroom today? A. Yes. Mr. Matson and Mr. Towers are present.

Q. Now, I take it you had a meeting, then, of the committee? A. It came up at one of our regular management meetings as an item.

Q. And that's where the decision was made? A. That's right.

Q. Now, how about the same question with reference to Evansville, Indiana? A. The same procedure applied to that.

Q. And where else has that procedure been used? A. Well, in anything that effects the price of the product, that has to be approved by the management committee of The Clorox Company.

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(Tr. p. 1061)

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Q. Where else have the three, five, and seven cents off on the different size bottles been used, besides Erie and Evansville? A. The Evansville promotion was only two, four, six cents off, not a three, five, seven. And those are the only two markets up to this time where the price off label has been used, sir.

Fred A. Brown—Direct

Q. Now, why was it two, four, and six in Evansville as contrasted to three, five, and seven in Erie? A. Those were both what you might call testing or experimental markets, and we were trying to find out how we could best defend the position of our brand in the markets.

Q. "Defend" you say? A. Yes.

Q. Yes, sir. Now, why, though, was it a different price in Evansville than in Erie? A. I say it was an experimental market. Both of those markets were. In one case we wanted to test the use of the three, five, seven cents off label, and in the other market we wondered if two, four, six, might be as effective, and we were trying to find that out.

(Tr. p. 1062)

Q. And what were you defending yourself against in Evansville, sir? A. The promotional activities of the competitor.

Q. What competitor was that? A. Purex.

Q. What competitor was it in Erie? A. Purex.

Q. Was the competitor doing the same thing in Erie that he was in Evansville? A. No. In Erie he had—he distributed very widely a coupon. As I remember it, it was redeemable at 10 cents per bottle on all sizes, and then there was a coupon, as I remember, of 25 cents redeemable on the gallon size. And he did not have a coupon in the Evansville promotion.

Q. What was he offering in Evansville? A. It was—in the first place, they were introducing a new design bottle in both of those markets. They had stepped up advertising, both in newspaper and cut in on national network television shows, a rather elaborate brochure delineating the advantages of the new design bottle, and that was substantially their effort in those markets.

Fred A. Brown—Direct

Q. Now, this cutting in on a national TV show, you mean a local cut in by a local TV station during a national program? A. That's my understanding of how it works, Mr. Tincher.

Hearing Examiner Haycraft: Did you say there was a

(Tr. p. 1063)

price concession in Evansville?

The Witness: We had a—you mean by Clorox?

Hearing Examiner Haycraft: By Purex.

The Witness: No, there was no price concession. As a matter of fact, in some of the original markets where they introduced their new bottle they actually raised their prices.

By Mr. Tincher:

Q. Then brought them right back down, didn't they, sir? A. They didn't—I didn't think they did it right away. I think recently they have been tending to bring the prices down, that's my—

Q. Now, Purex was also conducting experiments in Wichita, Kansas, and Louisville, Kentucky, of the same nature they were conducting at Evansville, Indiana, were they not? A. That's right.

Q. What did Clorox do in those two situations? A. We stepped up our advertising media to meet their advertising levels on those two markets.

Q. To meet their advertising levels, you say? A. Yes.

Q. And how do you know what their level was? A. Well, we know how many newspaper advertisements they run. They used—your distributor gets that information from the trade as to what your competitor has told the retailer he is going to do, and you have various ways of getting that knowledge.

Fred A. Brown—Direct

(Tr. p. 1064)

Q. Now, was there any premium offered in Wichita and Louisville? A. By whom?

Q. By Clorox. A. No, we had no reduction in price in those areas.

Q. All you had, as I take it, was an advertising campaign; no price differentials whatsoever? A. That's right.

Q. Are you familiar with the premium of an apron that has been given away by The Clorox Company, sir? A. An apron?

Q. Yes, sir. A. No, I am not, sir. I know about an ironing board cover, a self-liquidating premium. And I know about a plastic laundry bag, but I don't know about an apron.

Q. All right, sir. The ones you do know about, what areas were they used in? A. Well, the self-liquidating ironing board cover was used in the southeastern territory, southeastern part of the country; and as I now recall it, I think recently we have used that same promotional device in the Erie market.

Hearing Examiner Haycraft: I am interested in having a definition of this self-liquidating. What do you mean by that? It disappears?

The Witness: Well, let me explain that, your Honor.

(Tr. p. 1065)

I will try to explain it.

We give a redeemable coupon. In the case of the ironing board cover, as I remember it, it was something like 50 cents value. The housewife can redeem that at the retail store and get an item that may be worth a dollar if she bought it at a retail store.

Fred A. Brown—Direct

Hearing Examiner Haycraft: She gets it for 50 cents?

The Witness: She gets it for 50 cents, that's right, which is a quantity somewhere near the quantity cost that we buy it for because of the volume.

Hearing Examiner Haycraft: By "self liquidation" do you mean that it doesn't cost you anything?

The Witness: That's right. But it's a good value for the consumer.

Hearing Examiner Haycraft: Go ahead, Mr. Tincher.

By Mr. Tincher:

Q. All right, sir. Now, what other types of promotions have been used by The Clorox Company? A. You mean since the acquisition?

Q. Yes. The Clorox Company. A. The Clorox Company, all right. Well, we continue to use the fall and spring house cleaning promotion that was used by the old Clorox Chemical Company. We have added to that in this present campaign another self-liquidating premium, which is a plastic laundry bag that's tied in there with the spring house cleaning promotion.

(Tr. p. 1066)

Q. And what is the represented value of this bag, sir? A. It would retail somewhere normally between 75 and 85 cents, and it is redeemable with a 35 cent coupon. We talked about the self-liquidating ironing board cover. We have a test market in the eastern part of Texas whereby we are testing the transfer of newspaper promotion to television to see whether or not we can better spend our advertising dollars with more television than the newspaper advertising. Those are the only ones I can remember that we have used, Mr. Tincher.

Fred A. Brown—Direct

Q. Who is thinking up the test market areas in these promotions, sir? A. Clorox Company organization.

Q. Is there any supervision over them by the Procter & Gamble Company as to how many or how expensive these promotions can be? A. No supervision, no.

Q. You are entirely on your own? A. There may be some consultation, which I think is quite natural, in drawing on the experience of the Procter & Gamble Company, but there is no supervision.

Q. Do you have knowledge of coupons for Procter & Gamble products being given with Clorox? A. I have no knowledge, no, of such an arrangement.

Q. Would you have knowledge if such a thing occurred?

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(Tr. p. 1067)

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A. I have no knowledge of it, and I think I would have knowledge of it if it had happened.

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Q. In addition to the discounts we have previously discussed, does Clorox give a three per cent discount on truckload shipments of Clorox? A. No. A two percent discount on truckload shipments, Mr. Tincher.

(Tr. p. 1068)

Hearing Examiner Haycraft: Is that on carloads also?

The Witness: Yes, Mr. Examiner, it is really on a case basis. Normally a truckload is 750 cases, or a carload, although we have some remote areas that might run as high as 1200, where there is a long haul. And the one per cent discount on half truckloads is generally the custom, on 375 cases, but we have some areas where it might be as low as 225 cases.

Fred A. Brown—Direct

(Tr. p. 1069)

By Mr. Tincher:

Q. Mr. Brown, returning to the testimony you gave concerning the Kansas City plant of The Clorox Chemical Company, now The Clorox Company, was the equipment from the old Clorox Chemical Company plant removed and placed in the new Clorox Company plant, or was new equipment purchased? A. The equipment of the old Clorox Company—

Hearing Examiner Haycraft: Chemical Company, wasn't it?

The Witness: Well, at the time it was moved it was the company.

Hearing Examiner Haycraft: I see.

The Witness: After the acquisition.

Hearing Examiner Haycraft: All right.

A. (Continuing) —was sold to the Procter & Gamble Company and installed in the plant within the boundaries of the Procter & Gamble property.

By Mr. Tincher:

Q. So that included all the equipment and machinery necessary to make liquid bleach?

(Tr. p. 1070)

A. Well, that is a rather sweeping statement. There may have been one or two storage tanks added that were thought to be necessary in the new location, but in general, yes, that is a correct statement, Mr. Tincher.

Q. All right. Is The Clorox Company producing liquid bleach at full capacity at any or all of its plants, and you

Fred A. Brown—Direct.

may have to obviously give an explanation for that answer. A. In some of its plants it is producing—I can't give you the detail of it—it is producing at full capacity. If you limit it to one shift, however, you don't get that capacity. If you do not, you can get more production.

Q. I take it all the factories are working full time at one shift? A. No, I can't say that is true. There are some factories where the capacities of one automatic line, of one shift, is more than the production of the plant, and we tend to regulate that by using fewer people and running the machinery slower to get out whatever the production schedule requires.

Q. Have there been any changes made in the machinery since the acquisitions? A. It was fully—

Q. Or was it automatic? A. It was fully automatic when we got it, Mr. Tincher.

Hearing Examiner Haycraft: In this Kansas City situation, the Clorox that is being manufactured in Kansas City

(Tr. p. 1071)

is being manufactured by Procter & Gamble and not by Clorox?

The Witness: Yes. In effect, it is this, your Honor: It is being manufactured by the Procter & Gamble labor which, you might say, we rent from Procter & Gamble. The superintendent—there is a manager of the old Clorox Chemical Company in Kansas City, and he is located in the Procter & Gamble factory and is responsible to Mr. Montgomery, the vice president in charge of the manufacture at the Clorox plant located in Oakland. They know that the process is carried out so that we wind up with a product, the quality of which is satisfactory to The Clorox Company, and we pay Procter & Gamble toll charge for

Fred A. Brown—Direct

converting the raw materials into finished products. We pay them their costs plus a toll charge for converting the raw materials into finished products.

Hearing Examiner Haycraft: And the handling of that is the same as in the manufacturing itself?

The Witness: Practically.

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(Tr. p. 1072)

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By Mr. Tincher:

Q. Mr. Brown, has the management of the Clorox Company held any discussions or any meetings concerning private brand bleaches?

(Tr. p. 1073)

A. There have been, if I remember, one or two cases where we were asked if we would be interested in having private label bleaches or brand bleaches, and we said we were not.

Q. Why not? A. Because we didn't want to get into competition with ourselves, you might say.

Q. Is that the company's own bleach and private brand bleach for others? A. It could be.

* * * * *

(Tr. p. 1075)

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By Mr. Tincher:

Q. No. 1, sir: Does the Clorox Company have in its plans, or is the Clorox Company considering the erection of new production facilities? A. You mean new locations?

Q. Right, or increased capacity or size of existing locations.

Earl M. Matson—Direct

* * * * *

A. So far as new locations are concerned, we are continually studying the possible advantages of having new facilities and new locations. But we only spend the money for them if they are economically justified. But those studies are continually going on. Now we have no plans,

(Tr. p. 1076)

no immediate plans, for increasing the manufacturing capacities in existing plants.

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(Tr. p. 1123)

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Room 261,
United States Post Office,
Seventh & Mission Streets,
San Francisco, California.

April 15, 1958.

Met, pursuant to adjournment, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

* * * * *

(Tr. p. 1125)

PROCEEDINGS

* * * * *

Earl M. Matson

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Haycraft: Your full name and address?

The Witness: Earl M. Matson, 1135 Camino Vallecito, Lafayette.

* * * * *

Earl M. Matson—Direct

By Mr. Tincher:

Q. Would you state for the record your present occupation? A. I am Vice-President of Traffic for the Clorox Company.

Q. How long have you held that position? A. Since August 1st, 1957.

Q. And prior to that date what was your occupation? A. I was Vice-President and Secretary with Clorox Chemical

(Tr, p. 1126)

Company.

Q. In that capacity, what did your duties consist of? A. My duties were principally transportation, or the handling of traffic, for the Clorox Chemical Company.

Q. And the same question with respect to the Clorox Company. A. Practically the same work as I am doing now.

Q. As Secretary of the Clorox Chemical Company, did you have the normal duties of a corporate Secretary?

* * * * *

A. Well, my duties, I would say, were not what a normal Secretary of a corporation would perform, because those duties were performed by our Legal Department, or our attorneys. I handled such matters as inquiries from stockholders and exchanges or transfers of their stock, matters of that nature. But the making of notices or proxy statements to the stockholders was performed by our legal service.

Hearing Examiner Haycraft: You didn't keep the minutes, either?

The Witness: Our attorneys kept the minutes.

Earl M. Matson—Direct

By Mr. Tincher:

Q. Who was that primarily, Mr. Feigenbaum? A.
Mr. Feigenbaum, yes.

* * * * *
(Tr. p. 1147)
* * * * *

By Mr. Tincher:

Q. Let me now show you Commission's Exhibit No. 13, sir, and refer you there to Page 3, which has previously been identified as—

* * * * *
(Tr. p. 1148)
* * * * *

Mr. Tincher: 13.

By Mr. Tincher:

Q. Let me refer you to Page 3 on that document, sir, to the bottom of the page—let me refer you to the earned surplus, which you will note down at the bottom, and let me ask you if that amount was in cash. A. In cash?

Q. Yes, sir. A. No, sir.

Q. How was it distributed?

* * * * *
(Tr. p. 1149)
* * * * *

A. That is represented by cash, goods, equipment, buildings, anything.

By Mr. Tincher:

Q. All right, sir. Can you tell how much of that amount is cash?

* * * * *

Earl M. Matson—Direct

A. Actually the company carries a revolving cash, and after we have paid our bills for the month it would be way down, and when we receive our payments it would be way up. So we might have a million dollars on hand sometimes.

By Mr. Tincher:

Q. Well, let me ask you, the actual cash on hand is reflected earlier in this document, is it not? A. Yes.

* * * * *

A. The balance sheet shows \$390,000 on July 31.

* * * * *

(Tr. p. 1153)

The Witness: Well, while the balance sheet shows \$390,000 cash, there is over \$4 million in Government Bonds that are readily convertible to cash on the balance sheet.

By Mr. Tincher:

Q. Which also shows on the balance sheet? A. Yes.

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(Tr. p. 1156)

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Q. Mr. Matson, can you tell us how many bottles are in a case of liquid bleach by pints, quarts, halves and gallons?

A. Yes, sir.

Q. Can you tell us what that is? A. There are 24 pints; there are 12 quarts; there are 6 half gallons; there are 4 gallons to the case.

Q. And that has been true at least from 1955 or 1954 on?
A. It has been true since the history of the business.

Q. All right, sir.

* * * * *

Earl M. Matson—Direct

(Tr. p. 1157)

* * * * *

Q. Mr. Matson, I will hand you Commission's Exhibit No. 27.

* * * * *

Q. And refer you to Roman numeral nine. It is the agreement of purchase between the Clorox Company and Procter & Gamble, and I will ask you with reference to Roman numeral nine what the research contract there described involves.

* * * * *

A. We had a contract with Stanford Research to work out a project. They brought clothing for—I forget how many families; maybe a dozen, but they furnished these families with shirts, underwear, sheets, towels, and they laundered these articles weekly with Clorox, with other bleaches, and with different soaps or detergents to make a determination as to the superiority of Clorox in the laundry process. That project went on for more than a year and was the chief project which Stanford Research undertook for us. They may have done some other minor work of which I was not too familiar, but that was the chief project.

(Tr. p. 1158)

Q. What was the basic objective or purpose of the project, sir?

Hearing Examiner Haycraft: He stated it, to demonstrate the superiority of Clorox.

Is that right?

The Witness: That is right.

By Mr. Tincher:

Q. Did the project so demonstrate? A. Yes, it did.

* * * * *

Earl M. Matson—Direct

(Tr. p. 1159)

Q. From the period, let us say, 1952 through August 1, 1957, was the Clorox Chemical Company offered for sale to any other concern? A. No, sir. We never offered it to anyone.

Q. Did anybody else try to buy it? A. Now, this is only hearsay, but I have been told that different companies made inquiry, and——

Hearing Examiner Haycraft: Told by whom?

The Witness: They made inquiry——

Hearing Examiner Haycraft: I say, told by whom?

The Witness: Well, by Mr. Feigenbaum. They were told that different concerns had made inquiry if the company was for sale.

Hearing Examiner Haycraft: You had better get Mr. Feigenbaum for that.

Mr. Tincher: Yes; we have him subpoenaed.

A. (Continuing) Those inquiries were generally answered "No."

By Mr. Tincher:

Q. By yourself, sir? A. No.

Q. By your office? A. By Mr. Feigenbaum.

Q. So you have no independent knowledge of your own?

A. I don't know, no.

* * * * *

(Tr. p. 1161)

Q. Are you familiar with the price structure and the discount structure of The Clorox Chemical Company and The Clorox Company? A. Yes, I am familiar with the structure.

Q. Now, both before and after the acquisition, has the Clorox suggested retail price been made to the distributors by the company? A. Did you say retail?

Earl M. Matson—Direct

Hearing Examiner Haycraft: Yes, retail.

By Mr. Tincher:

Q. Yes, sir, suggested retail price.

Hearing Examiner Haycraft: To the consumer, you mean?

Mr. Tincher: Right, sir.

A. Well, we never made any suggested retail prices. We suggested a resale price to our distributor at which he would sell to the jobber or chain store. But we never made any suggested retail prices.

By Mr. Tincher:

Q. Well, that was true both before and after the acquisition? A. Yes, sir.

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(Tr. p. 1163)

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Q. Mr. Matson, how long have you been with The Clorox Company? A. Since May 6, 1929.

Q. Are you familiar with the facts or whether it is a fact that in 1930 The Clorox Company gave away a free pint of Clorox as a sample to induce sales? A. Yes, sir, I am familiar with that offering, that introductory deal.

Q. And from that time in 1930 to 1957, August 1, were any free samples ever given by The Clorox Company? A. Yes. They gave away many free samples. We had deals of maybe 50 cents per case and 25 cents per case, and we gave away samples at cooking schools in which we parti-

(Tr. p. 1164)

cipated quite extensively at that time, and we participated in a cradle car service, I guess for many years, and we still do, I guess.

Earl M. Matson—Direct

Hearing Examiner Haycraft: What is a cradle car service?

The Witness: Well, a nurse calls on a young housewife who has just become a mother and gives her a free bottle of Clorox, among other things, and gives her some instructions on how to care for the baby, and so forth; they call it cradle car.

Hearing Examiner Haycraft: She handles other products besides your product?

The Witness: Yes, that's right.

And we have had some deals in Los Angeles in 1949, I think.

* * * * *

Q. Did that involve free samples? A. Yes. I am sure it involved couponing and a deal to the jobber and retailer.

Q. All right, sir. Now, I would like to ask you some questions concerning the period 1952 to August 1, 1957. The first question is: During that period did the company, The Clorox Chemical Company—

(Tr. p. 1165)

* * * * *

Q. During that period did The Clorox Chemical Company give free samples to the consuming public, either by mail or by door-to-door distribution? A. Well, they gave free samples by distribution through a bride's book, which is a book given to couples when they apply for a marriage license. In that book there is a coupon entitling them to a bottle of Clorox. We still participate in that.

Q. Was that a nationwide undertaking? A. No. I think it covers the—I don't remember now. It used to be the eleven western states, but it may be more extensive today.

* * * * *

B. J. Feigenbaum—Direct

(Tr. p. 1166)

Q. Was this a book for brides published by Clorox or by an independent company? A. By an independent company.

Q. You participated in it? A. We participated in it.

Q. Did you get free advertising in the book or any place else? A. I can't say.

Q. My question is: Does that complete your answer to my question? Is that the only instance you can think of in that period? A. Well, we continued to participate in cooking schools and giveaway samples—in cooking schools and—oh, I don't know. There may be others, but that not being my end of the business, I am not too awfully familiar with it.

(Tr. p. 1169)

B. J. Feigenbaum

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Haycraft: Your full name and address, please.

The Witness: My initials are B. J. F-e-i-g-e-n-b-a-u-m, Feigenbaum. My address is 111 Sutter Street, San Francisco.

DIRECT EXAMINATION

By Mr. Tinch:

Q. Will you tell us for the record, sir, your occupation?

A. I am an attorney-at-law.

Q. Do you practice actively? A. I practice actively, yes, in San Francisco.

B. J. Feigenbaum—Direct

Q. Have you had any connection with the Clorox Chemical Company, sir? A. Yes. The company has been a client of our office for many years and I personally was a director and vice-president of the company since about 1930, I believe.

(Tr. p. 1170)

Q. Was that up to and including August 1, 1957? A. That is the Clorox Chemical Company you asked about?

Q. Yes, sir. A. Until the time of its dissolution, yes.

Q. And what department of the company were you in charge of, as vice-president? A. I was not in charge of any department. I had that title, as general counsel.

Q. Were you a stockholder? A. Yes, sir.

Q. From August 1, 1957, to the present time have you been connected with The Clorox Company? A. They have retained our office as counsel for the company, for The Clorox Company, and I personally have been doing a good portion of the work that they have from day to day.

Q. Are you an officer of The Clorox Company? A. No, sir.

Q. Are you a member of the board? A. No, sir.

Q. Do you own any stock in it? A. No, sir—well, as a stockholder of Clorox Chemical Company, I became a stockholder in Procter & Gamble.

Q. Let me ask you if your shares of the Clorox Chemical stock were distributed according to the acquisition

(Tr. p. 1171)

arrangements whereby you became a P & G stockholder.

A. Yes, sir. If I understood your question. Perhaps you should repeat it.

Mr. Tincher: Would you read the question, Mr. Reporter?

(Last question read.)

B. J. Feigenbaum—Direct

A. The Clorox Chemical Company stock wasn't distributed. I owned that, and I received Procter & Gamble stock upon the dissolution of The Clorox Chemical Company. I think that is what you were driving at?

Q. Yes, sir.

Hearing Examiner Haycraft: In proportion to your holdings in The Clorox Chemical Company?

The Witness: Yes. The exchange was $8\frac{1}{2}$ shares for 10 shares.

Hearing Examiner Haycraft: That is, $8\frac{1}{2}$ shares—

The Witness: Of Procter & Gamble—

Hearing Examiner Haycraft: For 10 shares that you had of Clorox Chemical?

The Witness: That is correct.

By Mr. Tincher:

Q. Were you familiar with the original negotiations and the agreement for acquisition in April of 1957, which preceded the August acquisition? A. Yes.

(Tr. p. 1172)

Q. And was there any change made after April of '57, and prior to the acquisition, any change from the original agreement which was drawn up in April? A. None that I recollect.

Q. And do I understand correctly that the basis for the exchange, the $8\frac{1}{2}$ to 10 ratio, was based on the shares outstanding in April 15 '57, with the minor exception of—

Hearing Examiner Haycraft: You mean the value, the market value of the shares?

Mr. Tincher: Value and number both, sir, with the possible exception of options which might be exercised.

A. Well, the agreement speaks for itself in that respect. I think your statement is correct, but the agreement, as I say, contains it.

B. J. Feigenbaum—Direct

By Mr. Tinch:

Q. All right, sir. Now, when did the negotiations with Procter & Gamble commence for the acquisition of Clorox Chemical? A. We had negotiations that didn't result in the transaction. Do you want me to give the earlier, sir, or just those that culminated in the transaction.

Q. No. Mention the earlier ones, too, please. A. I guess the negotiations commenced in December of '56, so far as any contact that the officials of the company had with Procter & Gamble. I am trying to get that year

(Tr. p. 1173)

right. It will come to me. It was the month of December; I can remember that part of it. Previously we had been approached, I personally, by Mr. M. F. Hellman, who is the senior partner in J. Barth & Co., who had been—his firm had been the investment bankers for The Clorox Chemical Company since its inception in 1929—'28, and former partner had been director for some years. He died a few years ago. Mr. Hellman approached me saying that—

Q. Now, if you will allow me to interrupt you, I think you would accept as good legal advice you shouldn't give us any hearsay. A. All right. That certainly would be hearsay, but I thought you were asking me about the negotiations.

Q. Well, you can just give us the facts, sir, and what occurred. A. Well, I said he approached me. That's a fact.

Q. And this was in December of '56, or prior to that? A. No, sir. I was saying it was quite prior to that.

Q. '55, perhaps? A. I think it was, yes.

Q. Now, do I understand that those earlier negotiations broke down for some reason? A. Yes; he approached

B. J. Feigenbaum—Direct

us, I started to mention to you, and I told him that after talking to Mr. Roth that we were not interested. He wanted to see if he couldn't make a

(Tr. p. 1174)

favorable deal. This was not necessarily Procter & Gamble, but he thought that the company had grown to a size where it might be advantageous to see if we could make a deal.

I might digress to say that the company prior to that time or after that received letters, I can't tell you whether the average would be five, six, or ten, or twelve a year, from other investment bankers or people who allege that they are trying to work up some deal.

Q. Were these people all investment bankers? A. I wouldn't know. You can't tell from their letterhead. We didn't answer many of the letters.

Shortly after that, oh, perhaps two months after, or a little less, after Mr. Hellman's call, I was approached by a local individual for another company of a very large size wanting to see if the Clorox could be acquired. I talked to Mr. Roth about it. Much to my surprise he evidenced interest.

That being so, I felt I was duty bound to tell Mr. Hellman that there had been a change of heart and that if he had something concrete to offer he should let me know. And he said that he thought that it was a fine company to acquire—maybe I should leave out the adjective—a company to acquire that might well fit in, he might well fit in with, would be Procter & Gamble, and he was going to explore it if it was all right.

(Tr. p. 1175)

I asked Mr. Roth, who assented that he would look into it. He proceeded to and set up an appointment for us

B. J. Feigenbaum—Direct

in New York City. I went on with Mr. Roth, and we had a preliminary meeting there, one further meeting, and the matter was dropped because we couldn't arrive at a satisfactory price.

Meanwhile, the other negotiations had likewise been dropped. Some eight or ten months later, something like that, in about October of '56, Mr. Hellman got in touch with me again, and he said, "You know,"—I shouldn't try and quote him—got in touch with me again with the avowed purpose of attempting to work out negotiations between the parties again. That culminated in further conference, and then the contract to which you referred.

Q. Right, sir. Now, what was this large company that you mentioned which was interested? A. Well, we tried to keep the name quiet, but I see no reason why I shouldn't mention it. It was the Monsanto Chemical.

Q. And what product does that company make? What products was that company making at that time?

* * * * *

(Tr. p. 1176)

The Witness: I am not familiar with all the lines, but they had recently acquired the Lion Oil Company, so they were in oil as well as all the chemicals. They had a half interest in Chemstrand so that they were in the viscose business. They had large plastic divisions, and they had a product by the name of All that was sold in the household trade.

Hearing Examiner Haycraft: That is a detergent, isn't it?

The Witness: Yes, sir. I think it is called a settler's detergent that they had worked up and the buyers offered it to The Clorox Company but they didn't see the future in it some time before that. We likewise were approached

B. J. Feigenbaum—Direct

—you are only interested in the names. Right in that same period, by Diamond Alkali.

* * * * *

Q. All right, sir. Now, can you tell us of your own knowledge whether the offer from Monsanto came before or after that concern was acquired by Lever Brothers?

A. Before or after it was acquired?

Q. Yes. A. Very considerably before, but let me say in fairness to Monsanto that there was no firm offer. There were acquisi-

(Tr. p. 1177)

tions that did not lead up to an offer. We broke them off.

Q. Now, did this negotiation that you are now referring to also fail because no agreement could be reached on price?

A. No. As I mentioned earlier, or I thought I had, I told Mr. Hellman of this. He talked, whether directly or indirectly I don't know, to Procter & Gamble. This is the first step now, again, you know. And we went East to see them. It appeared to the officers of the Clorox Chemical Company that if Procter & Gamble was interested in acquiring, we would much rather have that type of a transaction, assuming that the price would be fair. No price was mentioned at that time.

Q. And why were you more interested in Procter & Gamble, sir? A. I think it is a better company.

Q. For what reason, sir? A. Well, I am not an investment man, but I guess sometimes the record is better than your surmise, and if you will look to what has happened to the securities of Monsanto since the transaction as opposed to the securities of Procter & Gamble since the transaction, I think you will find that our judgment was sound.

B. J. Feigenbaum—Direct

Q. Yes, sir, but I didn't ask you if your judgment was sound. I am talking about at the time you made the

(Tr. p. 1178)

judgment you didn't have the advantage of the hindsight.
A. It wasn't hindsight. Our foresight is borne out by our judgment.

Q. Let's get back to the time you were considering the acquisition rather than now just giving your business decision which we will all admit was fine. At that time what were the reasons for preferring P & G? A. I tried to tell you.

Q. Can you tell me in terms of the present, sir? A. I tried to tell you that at that time it was felt that The Procter & Gamble Company was a more efficient, better run company. You see, there is another thing that enters into all of this, and you know this as well as I do, and I don't know whether it belongs in the record, but under our tax set up where you have a company that has been successful as Clorox had been and you have old-time stockholders who have substantial paper profits, you can't—and they were long in years and many of ours were—you can't sell out for cash other than at a rather distinct tax disadvantage. But the Internal Revenue Code suggests that it is very appropriate to be acquired by or be merged with some other company.

(Tr. p. 1179)

Q. Of course, as a lawyer, you realize the tax matter has nothing to do with the legality of the merger, don't you? A. You are not talking about legality. You asked me about advisability, and I think the tax result does tend to move us towards the—

Q. But that would have nothing to do with whether you buy from Monsanto or P & G, just the tax angle alone?

B. J. Feigenbaum—Direct

A. Not the tax angle alone, other than you end up with the paper of the company that you believe to be the desirable one, sir.

Hearing Examiner Haycraft: If I gather it correctly, what was uppermost, apparently, in your mind was to make a trade of stock, exchange of stock?

The Witness: That is right.

Hearing Examiner Haycraft: And you were exchanging stock that you had in Clorox for the stock either Monsanto or Procter & Gamble?

The Witness: Or Diamond Alkali or anybody else, surely, sir. Certainly.

By Mr. Tinchler:

Q. We spoke of various offers coming into the Clorox Chemical Company, sir. Let me ask you if Clorox Chemical Company sent notices out to anybody that they would be interested in exchanging stock. A. Only once. And that was through Mr. Hellman, in this

(Tr. p. 1180)

transaction to which I adverted before. The idea, I will admit, was not in the company. But we authorized him to proceed, in view of that, sir.

Q. So there was no attempt made by Clorox Chemical Company to trade stock with any other soap or detergent or cleanser or bleach company? A. Definitely not, sir.

(Tr. p. 1194)

Q. Mr. Feigenbaum, let me hand you what has previously been marked as Commission's Exhibit No. 28 for identification.

B. J. Feigenbaum—Cross

(Tr. p. 1195)

* * * * *

Q. Let me hand it to you, sir, and I will ask you if this isn't the notice of a special meeting of stockholders to vote on the acquisition of Clorox Chemical Company by the Procter & Gamble Company? A. That is correct.

Q. And it was published by Clorox Chemical Company?

A. It was issued, put out, yes, by Clorox Chemical Company.

Mr. Tincher: All right, sir.

I offer Commission's Exhibit No. 28 into evidence, sir.

* * * * *

(Tr. p. 1200)

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(The paper referred to, heretofore marked for identification Commission's Exhibit 28, was received in evidence.)

(Tr. p. 1201)

CROSS-EXAMINATION

By Mr. Royall:

Q. Now, Mr. Feigenbaum, who was the first person to approach you—the first person who approached the company about a possible sale? Was it Mr. Hellman? A.

That's correct. You mean—

Q. At that time. A. That ultimately resulted in the Procter & Gamble transaction.

Q. Yes.

* * * * *

By Mr. Royall:

Q. Well, do you know what his position was? A. He was a senior partner of J. Barth & Company.

Q. And what was the business of J. Barth & Company?

B. J. Feigenbaum—Cross

(Tr. p. 1202)

A. Investment bankers who had been the investment bankers, as I mentioned earlier, for The Clorox Chemical Company since its inception in 1928, 1929.

Q. Now, from whom did you first learn the name of Procter & Gamble in connection with this matter?

A. Mr. Hellman suggested it.

* * * * *

Q. Do you know when that was? Was it in 1955? A. I think that's right.

Hearing Examiner Haycraft: He said he thinks it was in October of 1955.

The Witness: I can verify that by office records,

(Tr. p. 1203)

but that is my best recollection.

By Mr. Royall:

Q. Now, when was the first time Procter & Gamble and the company discussed the matter? A. I met with two Procter & Gamble officials in New York City in December of that year.

Q. Did Mr. Roth arrange that? A. You mean Mr. Hellman?

Q. Did Mr. Hellman arrange that? A. Yes, sir.

Q. Up to that time had the Clorox Chemical Company had any communication, directly or indirectly, from Procter & Gamble before Mr. Hellman brought it to your attention? A. No, not before Mr. Hellman brought it to our attention.

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(Tr. p. 1207)

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B. J. Feigenbaum—Redirect

REDIRECT EXAMINATION

By Mr. Tincher:

Q. Do I understand you correctly that Mr. Hellman represented a 'bankers' investment group? A. No. J. Barth & Co. are stockbrokers and investment bankers, and they originally participated in the underwriting of the Clorox Chemical Company in 1928 and 1929, and at that time placed a substantial amount of the stock with their regular clients, many of whom they have today. So he has always been very close to the company, very much interested in it, because he represents, through being the financial

(Tr. p. 1208)

adviser, let us say, to his clients, many stockholders.

Q. Right, sir. Now, you would have no way of knowing whether this group of investment bankers was approaching Clorox on behalf of themselves or a client, would you?

A. There was no group. It was Mr. Hellman personally.

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(Tr. p. 1209)

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Q. Right. Now, you said there had been no correspondence with P & G up to a certain time. Do you recall that?

A. That is right.

Q. Does that include all communication as well? Or do you know? A. Yes, so far as I know. I can only speak for myself personally.

It would be hearsay to anybody else. But I would have had knowledge of it, I would have heard, as their counsel, and as close as I was, and I am satisfied that at the time he first broached the subject there had never been any connection, oral, written or in any way,

John F. Chaddock—Direct

by anybody in the company with Pröcter & Gamble. That is a pretty broad statement, but I think it is correct, sir.

Q. When did you first learn of the proposed acquisition by P & G? And I am speaking of the second attempt, apparently after the first one failed. A. Oh. The first time he spoke to me, Mr. Hellman came to me—this was in the end of '56, I can't remember now whether it was October or November, but in there—saying that this fell through, but he thinks it would have been sound, and he would like to proceed again to see if he could open it up, and could he have permission to do so.

Q. Did you then take his suggestion to Mr. Roth? A. Yes, sir.

* * * * *

(Tr. p. 1212)

* * * * *

John F. Chaddock

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Haycraft: Your full name and address?

The Witness: John F. Chaddock.

* * * * *

(Tr. p. 1213)

* * * * *

By Mr. Tincher:

Q. What is your occupation, sir? A. I am a food broker.

Q. What company are you connected with? A. Kelley-Clarke Company.

Q. What is your position with that company? A. Partner.

* * * * *

John F. Chaddock—Direct

Q. How long have you been connected with the Kelley-Clarke Company? A. Since 1919.

Q. And during that period of time has your company been a distributor of Clorox bleach? A. They have.

Q. Over what period of years, sir?

(Tr. p. 1214)

A. From that time, and from a few years previous. I don't know the exact date. About 1916.

Q. To the present time? A. To the present time.

* * * * *

(Tr. p. 1215)

* * * * *

Q. You were also asked, sir, to bring in a statement which will show the sales by Kelley-Clarke Company of other bleaches. Do you have such a statement? A. We do not sell any other bleaches.

Q. You sell Clorox exclusively? A. Correct.

* * * * *

Q. Now, as the distributor for Clorox bleach do you have an exclusive sales territory? A. We do, yes.

Q. And what is that territory? A. Northern California.

Q. How about the rest of California, and Oregon and Washington? A. That's all handled by other offices of the company. We have offices in Portland, Seattle, Los Angeles.

(Tr. p. 1216)

Hearing Examiner Haycraft: Are they exclusive in those areas?

The Witness: Those areas, correct.

Hearing Examiner Haycraft: Your partnership?

John F. Chaddock—Direct

The Witness: Our partnership. We cover everything except the San Diego area on the Pacific Coast.

By Mr. Tinch:

Q. And why is not that area covered, sir? A. Well, they have another distributor there, have had from the inception.

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(Tr. p. 1217)

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Q. Will you explain to us as briefly as possible just exactly how you purchase bleach or what your connection with Clorox bleach is and how you sell it? A. Well, as the sales agents or distributors, we buy from The Clorox Company and resell to wholesale grocers and other distributors in the various areas.

Q. You actually—

Hearing Examiner Haycraft: Chain stores, do you sell to chain stores?

The Witness: We sell to chain stores direct and wholesale grocers direct.

Hearing Examiner Haycraft: You don't sell to retailers?

The Witness: No, but we do have a force that solicits from retailers which, in turn, are routed through the wholesaler.

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(Tr. p. 1220)

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Q. Mr. Chaddock, I will hand you Commission's Exhibit 399-A and B for identification, and I will ask you if those are the prices currently being charged by The Clorox Company? A. To the Kelley-Clarke Company, yes.

John F. Chaddock—Direct

Mr. Tincher: Mr. Examiner, I offer Commission's 399-A and B at this time.

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Hearing Examiner Haycraft: It may be admitted, 399-A and B for identification.

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(Tr. p. 1228)

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By Mr. Tincher:

* * * * *

Q. Now, what else does your company sell besides Clorox, sir? A. Well, we sell sugar, canned goods, fruit jars, peanut butter, corn products. You name it, we have it.

(Tr. p. 1229)

Q. All right, sir.

And these salesmen that you mentioned sell these products and Clorox to the people they call on? A. They sell certain of these products. They sell what we call proprietary products.

Q. And which are those, sir? A. Well, they are those which would be identifiable primarily by brand. In other words, we don't attempt to sell bulk corn starch to a sales organization or bulk sugar.

Q. And do you have brands in all these various products that you mentioned? A. No.

Q. Which ones do you? A. Well, we have brands in sugar, in peanut butter. We have them in parts of all of the brands. Canned goods would be not a commodity but a category. And we represent, for instance, the F. H. Snow Company canned clams, and that is the brand.

Q. Do you sell any Procter & Gamble products, sir? A. We do not.

John F. Chaddock—Direct

Q. Now, what percentage of your business, approximately, is Clorox liquid bleach? A. Of our total business?

Q. Yes. A. About 12½ per cent.

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(Tr. p. 1231)

Q. Now, since you have been selling Clorox from 1952 until August 1, 1957, during that period of time, 1952 until August of 1957, did the Clorox Company ever distribute any coupons to the public for Clorox bleach, and by "coupons" I mean 3¢ off for a quart or 7¢ off for a gallon or anything like that? A. No, sir, they did not.

Q. I will ask you if they ever distributed any free samples to the public, either direct or through the mails? A. Not to my knowledge.

Q. I will ask you if the Clorox Chemical Company ever had any contests such as a \$60,000 contest, either for completing a jingle or solving a puzzle or something of that nature? A. No.

Q. I will ask you if during that period Clorox liquid bleach was ever tied into any other product on a price basis or a giveaway basis? A. No.

Q. I will ask you that if during that period of time the Clorox Company ever distributed any free premiums to housewives either with the purchase of a bottle of Clorox or a coupon on the bottle to be sent in for a free premium? A. No.

Q. Now, you are, of course, familiar with the Clorox Fall

(Tr. p. 1232)

and Spring housecleaning drive, are you not? A. Yes, sir.

John F. Chaddock—Direct

Q. And when did those two particular drives commence as far as your particular experience with them is concerned? A. I would say two years ago.

Q. Are these two drives successful in increasing the sales of Clorox?

Mr. Royall: Objection.

Hearing Examiner Haycraft: Overruled.

A. I would say that momentarily they are.

By Mr. Tincher:

Q. During the period of the drive; is that correct?

A. Yes.

* * * * *

(Tr. p. 1233)

Q. Do you distribute any other nationally advertised product in addition to Clorox? A. Yes.

Q. And what products are those, sir? A. Well, we sell the Staley Manufacturing Company's products, Sta-Flo, Sta-Puf.

Q. Are those starches or a bluing? A. Yes, sir. One is a starch and the other is a fabric conditioner. Sta-Puf is a fabric conditioner, and Sta-Flo is a starch.

Q. Do you sell any soaps, detergents, or cleansers? A. We represent the Calgon Co. who are a producer of a water softener.

Q. Calgon? A. Yes. The Hagen Corporation.

Q. Do they make products for dishwashers? A. Yes.

Q. Do you sell that? A. We do sell that.

Q. And that product competes with the Cascade product of the Procter & Gamble Company? A. Correct.

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(Tr. p. 1242)

Room 261,

Proceedings

United States Post Office,
Seventh & Mission Streets,
San Francisco, California

April 16, 1958.

Met, pursuant to adjournment, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

* * * * *

(Tr. p. 1244)

PROCEEDINGS

* * * * *

(Tr. p. 1248)

Mr. Tincher: Mr. Reporter, would you please mark as Commission's Exhibit 402 for identification a one-page document entitled Clorox Chemical Company Advertising and Promotional Expenditures for the period 1952 through July 1957, and as Commission's Exhibit 403 a document of The Clorox Chemical Company, same title, for the period August 1, 1957, through December 31, 1957;

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(Tr. p. 1249)

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Mr. Tincher: Mr. Examiner, at this time I offer Commission's Exhibits 402 through 407.

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(Tr. p. 1255)

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(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 402 and 403, were received in evidence, in camera.)

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Bernard F. Trimpe—Direct

(Tr. p. 1266)

* * * * *

Bernard F. Trimpe

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Hearing Examiner Haycraft: What is your full name?

The Witness: Bernard F. Trimpe. The F is for Franklin.

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(Tr. p. 1267)

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By Mr. Tinch:

Q. Mr. Trimpe, would you state for the record, please, your occupation? A. I am Vice-President in charge of sales of the Clorox Company.

Q. And how long have you held that position? A. Since August 1st.

Q. 1957? A. 1957.

Q. And what was your position prior to that time, sir? A. Vice-President in charge of sales of The Clorox Chemical Company.

Q. And how long had you been in that employment? A. July 6, 1955.

Q. And during the period from 1955 to the present you have been Sales Manager in charge of selling Clorox liquid bleach? A. Correct.

Q. Mr. Trimpe, the sale of liquid bleach is heaviest in the period of May to September each year, isn't it? A.

There is a seasonal increase during the summer months.

Q. And then in answer to my specific question, the sale

Bernard F. Trimpe—Direct

is heaviest from May to September? Is that what you refer to as the summer months? A. Yes, that's correct.

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(Tr. p. 1275)

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Q. All right, sir. Now, a Mr. William Bernard Young became division sales manager for the Pacific Division of The Clorox Company in January of 1958, did he not?

(Tr. p. 1276)

A. Yes.

Q. And immediately prior to that he had been district manager of the San Francisco district of the Case Soap Sales Department of the Procter & Gamble Distributing Company? A. Correct, yes.

Q. How many other divisional sales managers are there? A. Four in addition to Mr. Young.

Q. And will you tell us who they are in each case and how long they have held the position and where they came from immediately prior to taking the positions? A. The first one we hired is Frank E. Bosworth—B-o-s-w-o-r-t-h.

Q. And— A. He came with us a little over a year ago, I guess about 14 or 15 months, I don't have the exact date.

Prior to that time he was with the Otis-McAllister Company of New York.

The second one we hired was William E. Everett—E-v-e-r-e-t-t. He's been with us a little over a year. Again I don't know the exact dates. Prior to that time he was with Wright's Silver Cream people—W-r-i-g-h-t's.

The third man we hired is Arthur E. Laramy—L-a-r-a-m-y. He was previously with Grocery Store Products, Incorporated.

Bernard F. Trimpe—Direct

Q. And when was he hired? A. And he has been with us about six or seven months, I'd

(Tr. p. 1277)

guess, something like that.

Q. Was he hired before or after the acquisition? A. He was hired before the acquisition. And then recently we have hired Edward Melnick—M-e-l-n-i-c-k—who has been with us about 45 days, I guess. He was previously with the Quaker Oats Company.

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(Tr. p. 1278)

Q. Let me ask you first preliminarily, if I may: Isn't it a fact that private label bleaches in the retail stores sell at a considerably lower price than Clorox does? A. Well, it—is it necessary to—may I ask you a question? Is it necessary to define "considerably"? I don't know.

Q. Well, let me suggest to you as a typical example, for example, that a quart of Clorox sells in the average retail store at 19 cents, where a quart of private brand bleach will sell in the same store right next to the Clorox any place from 12 to 16 cents. A. Yes, that's true.

Q. And that's typical? A. That's a typical range.

Q. Right. Now, will you tell us the reason the Clorox Company in January of 1958 was interested in this private brand competitive situation? A. Yes. The Clorox Company interest was mine, and I was very concerned about the increasing number of private labels, and I felt it my responsibility to know how many there were and where they were and other information, any other information I could get about it.

Q. Were the increased number of labels indicating an increased number of producers? Or do you know? Or were they the same producers and not more private labels?

Bernard F. Trimpe—Direct

(Tr. p. 1279)

A. Well, from the information that I have I would guess that there have been some new entrees in the industry, but in general this represents established suppliers being willing to pack private label bleach.

Q. But your knowledge as contrasted to your guess, your knowledge is that it's established producers expanding the number of private labels they have? A. Yes.

Q. Was this true nationally or just in selected areas of the nation? A. Well, it's concentrated in certain areas, but it's true nationally.

Q. All right, sir. Now, up to the present time did either The Clorox Chemical Company or has The Clorox Company ever produced a private label bleach? A. No.

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(Tr. p. 1283)

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Q. Now, Mr. Trimpe, at this time and for a couple of months plans had been under way for the 1958 spring housecleaning drive for Clorox, had they not? A. Correct.

Q. And that drive is scheduled to commence approximately April 17th to 18th in the south and a week later in the north, or do I have it backwards? A. No, that's correct.

Q. Now, it is a fact, is it not, that in this spring cleanup drive a zippered, heavy plastic laundry dampening bag will be given as a premium with the purchase of a quart, half gallon, or a gallon of Clorox and the payment of 35 cents by the consuming purchaser? A. She buys the product and takes a portion of the label and puts her name on it and sends it in with 35 cents, with the premium, yes.

Q. And these premiums are being shipped from Cincinnati, Ohio, is that correct? A. No, samples were sent

Bernard F. Trimpe—Direct

to them so they would have an idea of what they look like, a few samples, but the housewife sends 35 cents and a portion of the label to a redemption point. They have nothing to do with the redeeming.

Q. Where is the redemption point, sir? A. Cincinnati, Ohio.

(Tr. p. 1284)

Q. That is the offices, of course, of the Procter & Gamble Company where they send for redemption? A. That's correct.

(Tr. p. 1285)

Q. In your years with The Clorox Chemical Company prior to August 1, 1957, did The Clorox Company ever give any free premiums of this or any other nature to the consuming public?

Hearing Examiner Haycraft: Clorox Chemical? We are trying to keep them apart.

* * * *

A. No, we did not have any self-liquidating premium.

Hearing Examiner Haycraft: This "self liquidating" you are putting in there all the time—did you have any kind of a premium?

The Witness: Well, in Canada we had a five-cent token, which we issued to the distributor, and he, in turn,

(Tr. p. 1286)

issued to some demonstrators, and they, in turn, issued that to the housewife as she came in the store. And then—

Hearing Examiner Haycraft: I think his question was the United States, domestic.

The Witness: I am sorry. I didn't gather that.

A. In the United States, no.

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Bernard F. Trimpe—Direct

By Mr. Tincher:

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Q. I ask you the same question as to the same period of time with respect to price-reducing coupons, such as were used in Erie, Pennsylvania, and Evansville, Indiana, subsequent to the acquisition. Are you familiar with those?

A. Yes. No, we did not use those.

Q. During that same period of time did the Clorox Chemical Company ever utilize any contests among the consuming public? And, by that, I have reference to something such as a \$60,000 Treasure Chest or any comparable contest.

(Tr. p. 1287)

A. No, we did not use that.

Q. During that same period of time did the Clorox Chemical Company ever give away free samples to the consuming public, as distinguished from new mothers and that sort of thing; just to the public in general? A.

No, we did not.

Q. During that period of time did The Clorox Chemical Company ever offer Clorox in connection with any other product, other than your Spring and housecleaning drives, where Clorox was related to housecleaning products? What I have in mind is a situation where Clorox is offered with a box of detergent or cross-coupons or cross-price relationship. A. We were approached, but we did not do it.

Q. Approached by a soap and detergent company?

A. No. O'Cello sponge people, as I understand it, and Staley's starch.

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(Tr. p. 1290)

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Q. Mr. Trimpe, you will recall the questions I was asking you before recess for the time period from '55 through

Bernard F. Trimpe—Direct

August 1, of '57. I have one more question along those lines.

At any time during that time period did The Clorox Chemical Company ever tie in the sale of a smaller size bottle with a larger size or giveaway or reduce the price on a smaller size if a larger size were bought? A. No.

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(Tr. p. 1314)

Q. All right, sir. Now, let me ask you if you are familiar with the New York Journal American Survey concerning Clorox?

(Tr. p. 1315)

Hearing Examiner Haycraft: What is the date of that?
Mr. Tincher: It is dated January 24, 1957.

A. I think it represents typical newspaper presentation in terms of what the newspaper did to further implement the promotional campaigns that we have had, and probably it has come across my desk.

By Mr. Tincher:

Q. Is this something done only by the large city newspapers, sir? A. No. I think, in general, all the newspapers provide a newspaper merchandising service.

Hearing Examiner Haycraft: You mean you have to pay them for that?

The Witness: No, sir. They offer that as one of the benefits of placing ads with the newspaper.

Hearing Examiner Haycraft: Oh, placing ads with them.

Well, did you have anything to do with the preparation of this?

The Witness: Nothing.

Hearing Examiner Haycraft: Did you buy anything from or furnish anything to the newspaper?

Bernard F. Trimpe—Direct

The Witness: No.

Hearing Examiner Haycraft: What this really is, then, is an attempt on the part of the newspaper to increase

(Tr. p. 1316)

its advertising by demonstrating the service to certain advertisers?

The Witness: Yes, sir. To everyone, I think, they offer the same.

Hearing Examiner Haycraft: I am somewhat familiar with that practice.

By Mr. Tincher:

Q. Mr. Trimpe, are you familiar with the press release issued by Clorox Chemical Company from Oakland, California, concerning the acquisition of Clorox by Procter & Gamble? A. Yes. I read it.

Mr. Tincher: I would like marked as Commission's Exhibit No. 413—

Hearing Examiner Haycraft: It is two pages, isn't it?

Mr. Tincher: Right, sir. (Continuing).—A and B.

Hearing Examiner Haycraft: What is the date of that?

Mr. Tincher: A press release dated April 22, 1957.

(The papers referred to were marked Commission's Exhibits 413A and 413B for identification.)

By Mr. Tincher:

Q. I will hand that to you, sir, and ask you if that isn't a press release put out by Clorox Chemical at the time the

(Tr. p. 1317)

proposed acquisition was first publicly announced. A.
Yes, sir. That is.

Bernard F. Trimpe—Direct

Mr. Royall: No objection.

Hearing Examiner Haycraft: Commission's Exhibits 413A and B for identification are received in evidence.

(The papers referred to, heretofore marked for identification Commission's Exhibits 413A and 413B, were received in evidence.)

By Mr. Tincher:

Q. Mr. Trimpe, have you been familiarized with the price increases of Clorox in '56 and '57? A. Yes, I have.

Q. And how many price increases were there in 1957? A. Two.

Q. One before and one after the acquisition? A. Correct.

Q. And what was the reason for those two price increases? A. Well, in both cases increased costs.

Q. Just costs in general or specific types of costs? A. Well, I think in the first increase we had freight and glass and cap and other costs. And the November price increase was because of certain freight costs and increased administrative expenses.

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(Tr. p. 1319)

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By Mr. Tincher:

Q. Let me ask you if the retail price of Clorox went up subsequent to the second, 1957, increase, if you know; and by "retail," I mean to the housewife in the grocery store.

A. I want to get clear again. You mean after we increased the price in November, did retail prices go up?

Q. In November or December or even after that. A. Well, in certain parts of the country, yes, and in other

Bernard F. Trimpe—Direct

parts, no. That is the reason I find it difficult to answer the question.

Q. I see, sir. All right. A. It's dictated by the local competitive situation and by the decision of the wholesaler and Chain who purchase Clorox from our distributors.

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(Tr. p. 1320)

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Hearing Examiner Haycraft: No. 1, is there any national, is there any competitive producer or processor that sells everywhere that you sell?

The Witness: No, there is not.

Hearing Examiner Haycraft: Is it a fact that in numerous local areas there are competitors?

The Witness: Yes, that is true.

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(Tr. p. 1326)

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By Mr. Tincher:

Q. Mr. Trimpe, have coupons which reduce the price to the consumer been used by The Clorox Company anyplace other than Erie, Pennsylvania, and Evansville, Indiana?

A. We do not use coupons in Erie, Pennsylvania.

Q. I beg your pardon, sir. I mean all prices in labels.

A. Have they been used?

Q. Yes. A. In Erie, Pennsylvania, and Evansville, Indiana, is all.

Q. Right; and will you tell us the location and the type of premium that was used at that location in every instance where

(Tr. p. 1327)

premiums have been used by The Clorox Company? A. Yes. We used them in the Southern part of the United

Bernard F. Trimpe—Direct

States for over three years, and we have found that we are facing a sales trend that is adverse.

Q. Now, excuse me, sir. A. All right.

Q. I merely asked you if you would tell us where the Clorox Company, since August 1, 1957, has used premiums of this type. A. We use premiums of this type in the southeastern region of the United States, and there we use a self-liquidating ironing board cover premium. And then in Erie, Pennsylvania, we used the same self-liquidating ironing board cover premium at a later date and currently we are using nationwide the laundry-dampening bag, self-liquidating premium.

(Tr. p. 1328)

Q. Has The Clorox Company, which of course means since August 1, 1957, used any coupons to the consumers?

A. No, we have no coupons.

Q. Has there been any contest? A. No.

Q. For consumers? A. No contests.

Q. Have there been any product combinations, either 2 for 1 with small size free or large size 1, or anything of that sort? A. No. There has not been.

Q. Has there been any combination with any other non-bleach product? A. None. When I say none, I mean not initiated by us. If a local retailer decided he wanted to tie in something with Clorox, that was his decision, not ours.

Mr. Tincher: That is all.

CROSS-EXAMINATION

By Mr. Royall:

Q. But those methods which were described in the last question by Mr. Tincher have been used by other bleach

Bernard F. Tripp—Cross

manufacturers, have they not? A. Yes. All of the merchandising techniques are available to everybody.

Q. But they have been used by competing bleach manufacturers?

(Tr. p. 1329)

A. Yes.

Q. And the premiums which you referred to as being used in the southeastern part of the country started when, for Clorox or Clorox Chemical? A. Well, we used the first premium, which was the ironing board cover, in the fall of '57.

Q. The—Not an ironing board cover, but has that sort of premium been used by competing bleaches? A. Yes.

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(Tr. p. 1339)

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Q. What is your principal duty, as Sales Manager?

A. To sell Clorox

Q. And in connection with that duty, do you or do you not keep in contact with your distributors and through them with the trade, in an effort to sell Clorox? A. The first year I was with the company I traveled 42 weeks out of 52; the second year 37. And then, as we got division men, I was able to cut down on my traveling. But my first two years primarily were made up with personal contacts to meet the distributors, and then certainly through correspondence, and now I hope more through these division

(Tr. p. 1340)

managers; but always constantly daily, hourly, to get every piece of information about competitive circumstance or any other factor involved in sales management.

Q. Has there been any change in that purpose or method of selling and keeping up with the results after the merger,

Bernard F. Trimpe—Cross

from what it was before the merger? A. Absolutely not.

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(Tr. p. 1347)

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Q. Now, has Clorox any plans at all for entering the private label business? A. None.

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(Tr. p. 1360)

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Q. Mr. Trimpe, the spring housecleaning campaign, as you have testified, has extended since 1946—

Hearing Examiner Haycraft: No. '55.

Mr. Royall: I mean '55.

Hearing Examiner Haycraft: '56.

Mr. Royall: '56. '56 is what I meant to say, '56.

By Mr. Royall:

Q. What reason did you have for premium being added this time? A. Well, we have been considering that for a long time.

Q. How long? A. Oh, practically from the beginning. When I was with another company I used premiums extensively, and when you have a promotion, any company, every company that has a promotion, after you use it a couple of times and if you stay on the same thing, you have got to do something to freshen it so that your sales force will have something new and a little different to talk about.

And we had long planned to have a self-liquidating premium in conjunction with these fall and spring promotions.

We may change it to something else later. We are not going to stick with it forever. But it seemed like a good idea at this time.

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Bernard F. Trimpe—Cross

(Tr. p. 1361)

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Q. Now, there was some discussion today about the premium redemption on this housecleaning plan. State whether or not Clorox pays Procter & Gamble for its redemption service? A. We pay them.

Q. Are there other independent services who would perform the same functions? A. Yes.

Q. On the record, Mr. Trimpe, there were some matters that the—there was one matter that seemed to me a little unclear. It may be on a question.

But I would like to ask you whether there is any area where Clorox does not have competitors. A. None.

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(Tr. p. 1362)

Hearing Examiner Haycraft: I have got a couple of questions that are bothering me a little bit here.

The use of premiums and things of that kind, you say you have been doing that before you came to Clorox?

The Witness: Yes, sir.

Hearing Examiner Haycraft: Who were you with?

The Witness: Stokely-Van Camp, Incorporated.

Hearing Examiner Haycraft: Does Stokely-Van Camp occupy the same position marketwise that Clorox occupies?

The Witness: Without divulging the actual figures, I was sales manager and my volume was bigger dollarwise.

Hearing Examiner Haycraft: I mean percentagewise.

The Witness: Yes. In its own industry it did within five or six per cent of what Clorox does in its industry, yes.

Hearing Examiner Haycraft: And would you say that the use or practice at that time was responsible for your getting that position?

Bernard F. Trimpe—Redirect

The Witness: Well, we felt that they were very successful techniques.

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REDIRECT EXAMINATION

By Mr. Tinch:

(Tr. p. 1363)

Q. You say you have competition in every area of the United States? A. Yes.

Q. Or competitors? A. There is a competitive bleach in every market in which we sell.

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(Tr. p. 1366)

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By Mr. Tinch:

Q. Has anybody given orders to you that there are to be no changes in the promotion of the merchandising of Clorox Bleach? A. Well, I—nobody give me any orders about what we do merchandising-wise at any time.

Q. Nobody has given you any orders? A. Nobody has given me any orders about what we are to do to merchandise our product.

Q. So if there is no change, all you are doing is just a coincidence there has been no change; is that right? A. Well, I like to think, Mr. Tinch, that most of the techniques that we are using today have been available in the food industry for as much as 25 years. I know they

(Tr. p. 1367)

have been.

Q. That's right. And they have been available—

Mr. Royall: Wait a minute. Let him finish his answer.

Bernard F. Trimpe—Redirect

By MF. Tincher:

Q. Are you through, sir? A. No, I wasn't through.

Q. Go right ahead. A. And that you have to change your techniques to meet the circumstances of the times. The Clorox Company, Corox Chemical Company, did that before I ever came to work for them. We did it when I did come to work for them for a few years, and we have done it since August the 1st, 1957.

(Tr. p. 1368)

Q. Of course, now, your earlier testimony that during the period you were there, there were no price-reducing coupons, there were no samples, there were no tie-ins? A. That's right.

Q. The testimony you are giving now does not conflict with that, does it? A. Well, Mr. Tincher, after the 1949 or 1950 recession, the company made a decision to discontinue promotional techniques of that type and go into national advertising, and I think it paid off pretty well in terms of sales. They beefed up their advertising when the economy was prosperous, and the reasons we went into these spring and fall promotions—at least I did—was that I felt very strongly there was a growing increase in competition in 1957 especially, and the reason I wanted to strengthen it was because of the current recession, and I feel that the entire economic picture has changed, not only in our industry, but in the industry in general.

I feel that if I am any good at all as a sales manager, that I have to meet the competing times.

Q. The changes, then, are the recession; is that it? A. Well, I think there are many things, Mr. Tincher. One of the things that has happened in the food industry, and I am sure you are aware of this, is that there has grown

Bernard F. Trimpe—Redirect

in the last two or three years a great number—there have grown

(Tr. p. 1369)

I am sorry, a great number of chains which are composites of a small group of stores and as they came together and gain buying power, they are in a better position to go into two or three things: one, their own labels, because these individual chains in each market have a good name. For example, Vaughn's in Los Angeles, or any other one you want to name; and as they get this gaining power, then they get into these private labels, and that is one of the big factors that has developed in the last few months, which caused the competition situation to change considerably.

Another thing is that this is a stable item I am selling, and one or two or three cents is an important thing to the housewife, especially when she is facing a recession period, and she has to eat and wash her clothes every week.

Q. Are you through? A. Yes.

Q. I take it during this recession period that coupons and premiums and price-reducing devices of whatever nature or tie-ins of other products would be much more effective in the period of 1956 or 1957 which was not a recession period? A. Well, I would say this, Mr. Tincer:

As vice-president in charge of sales of this company, I am going to look each and every day at different types of advertising techniques available to us in the industry.

Q. Yes.

(Tr. p. 1370)

A. And I feel very strongly about the success of this company, but I am not going to be blind to the other promotional tactics.

Bernard F. Trimpe—Redirect

(Tr. p. 1371)

(Question read.)

A. I am sorry if I didn't convey an answer, Mr. Tincher. I have no proof that these techniques will sustain our position in the bleach industry. But I am going to look at them.

By Mr. Tincher:

Q. Are you testifying now that these sorts of things are not effective in a recession? I got the opposite impression from your previous testimony.

* * * * *

The Witness: Well, we don't have any proof, Mr. Tincher. There is no way to—

Hearing Examiner Haycraft: He wants your opinion.

By Mr. Tincher:

(Tr. p. 1372)

Q. Didn't you say the company stopped, after the '49 and '50 recession, the company decided not to use those things?

* * * * *

A. In general, I would say, Mr. Tincher, in the period of an expanding economy, with people in full employment and so forth, without getting away from the answer, that you could probably sustain your position better with increased advertising, but in a period of recession you might resort, you might get better results resorting to this type of promotion.

Q. Using those promotions, you tie them in with advertising; you don't use them by themselves, do you? A. Well, some of them.

Q. Such as? A. This self-liquidating premium. You would advertise that.

Bernard F. Trimpe—Redirect

Q. Can you give me one premium you would not advertise? A. You would if you felt it warranted the expenditure.

Q. Yes, sir. And my question was, can you name one of those where you would not use advertising? A. Yes. If we used them in some instances where we just already had our advertising schedule set up and couldn't afford another ad, we would just let it stand on its own. It might be one way to test it actually.

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(Tr. p. 1375)

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Q. You testified that various bleach competitors had engaged in competitive promotions. Can you tell me any bleach competitor that has had a contest amongst the consuming public? A. Yes.

Q. Which one? A. Purex.

Q. Any others? A. I can't name them, but there have been some.

Q. Was Purex tied in with other products, or was it Purex alone? A. I believe it was tied in with other products, but I am sure bleach was in it.

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(Tr. p. 1380)

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By Mr. Tincher:

Q. Now, I have one final question, I believe, or just two final questions: One is: Is it your testimony, or do I misunderstand it, that you would prefer in your Spring drive

(Tr. p. 1381)

to try to tie into brooms rather than products such as Comet or Spic 'N Span or products of that nature? A.

Bernard F. Trimpe—Redirect

My testimony was that I would prefer that they tie in with high mark-up specialty items, like waxes, polishes, tie in with brooms and mops and pails and items of that higher mark-up, so that when the whole display is moved by the consumer, or purchased by the consumer, that the retailer will get a good margin of profit out of that section of the store that he has devoted to the display, rather than some of these other items that have lower percentages of mark-up.

* * * * *

(Tr. p. 1382)

* * * * *

Q. You testified that Clorox Chemical had long planned a premium. Was anything like that reduced to writing or was it all in people's minds? A. No. I believe I have in my files letters from the premium people, who, and I have corresponded with them, they have come and called on me and suggested various types of premiums. I have evidenced by interest to various manufacturers.

Q. Well, what your testimony means is that premium people are constantly calling on you, as well as all the other

(Tr. p. 1383)

manufacturers? A. And I have contacted the people with whom I used to do business. I believe those are in my records.

Q. If the consideration had been that extensive, why hadn't premiums been used prior to the acquisition by P & G? A. Well, Mr. Tincher, when I first came with the company it was my recommendation that we try these Fall and Spring housecleaning promotions; and frankly, for the first go-round we didn't get very good results. And, as each promotion has gone on and the distributors have, I guess, gotten more practice or more thought has

Bernard F. Trimpe—Redirect

been given to it, or they see the value in it, they have become progressively better promotions. In the early stages, I think, I am sure the first couple, I was not sure that the thing would work at all. One of the problems in the bleach industry is whether or not you can get displays of bleach. People are a little leery of making displays of the product, from the breakage point of view. I wanted to try these promotions to see if our distributor salesmen could do the job of getting displays, how successful they would be. And then, as we progressed, and as we got progressively more successful, we realized we would have to do something to make them more interesting each time to a salesman. He needs something to talk about.

* * * * *

(Tr. p. 1385)

Q. All right, sir. Now, you have testified something has to be added to these drives each time? A. Yes.

Q. May we take it from that that in future drives it will be necessary to add coupons or contests, things of that nature? A. Well, Mr. Tinker, we are giving a lot of thought not only to all of the elements that are available in merchandising, but giving some thought to possibly re-naming them or at least one of them, with more emphasis on other uses of our product rather than on housecleaning in the fall, for example.

Q. Yes. Now, my question is, sir, are we to understand that because you have just testified something new must be added to these contests that in the future we can expect coupons or contests or things of that nature to be added for the same reason that the premium has been added to this year? A. We are going to take a long look at how the spring promotion comes out, and then if it proves pretty well, it's conceivable that if circumstances remain

Neil Shaver—Direct

the same we will consider coupons and other merchandising devices.

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(Tr. p. 1389)

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Neil Shaver

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

(Tr. p. 1390)

Hearing Examiner Haycraft: Give me your full name and your address.

The Witness: My name is Neil—N-e-i-l—Shaver—S-h-a-v-e-r.

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DIRECT EXAMINATION

By Mr. Tincher:

Q. Mr. Shaver, would you state for the record what your occupation or position is? A. Yes. I am the advertising manager of The Clorox Company.

Q. And have you been that since its inception in August of '57? A. Yes.

Q. And what was your occupation prior to that time, sir? A. Advertising manager of The Clorox Chemical Company.

Q. And for how long had you held that position? A. Since March of 1953. About—since March of '53, anyway.

Q. All right, sir. Prior to March of '53 had you had any advertising or merchandising experience? A. Yes. I had been the advertising manager of the Gallo Wines, and also with Knox Reeves Advertising Agency on General

Neil Shaver—Direct

(Tr. p. 1391)

Mills products.

Q. All right, sir. Now, will you tell us in just as brief form as you can what your duties consist of as advertising manager? A. Essentially liaison with our advertising agency; interpret the company through the agency and the agency's recommendations to the company.

Q. All right, sir. And in so doing may we assume that you work in close conjunction with the advertising agency involved here? — A. That's correct.

Q. And all of your advertising, I understand, or did I understand it correctly, is handled through an agency, the Honig-Cooper Company? A. The Honig-Cooper Company, that is correct, except for some advertising in the Jewish Tribune in New York that is placed through the Joseph Jacobs Agency. That is just in one newspaper.

Q. All right, sir. Now, is it correct that the various homemaker service and cooking school sessions and that sort of advertising was eliminated in view of additional promotional expansion during the year 1958 and that it was felt that the eliminated type of activity was not giving as great a return per dollar as the anticipated type of activity? A. We dropped those programs primarily because of the lack

(Tr. p. 1392)

or, rather, the decline in the audience and the falling off of coverage. For example, our cooking schools dropped from 240,000 people covered in 1956 to 220,000 in 1957. And there was also a decline in the coverage of the cradle car service.

Q. And in connection with notifying the distributors that those services were being discontinued, you did point out that you anticipated promotional expansion during the

Neil Shaver—Direct

next year, did you not? A. The recognized media, yes, that was more readily measurable.

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(Tr. p. 1394)

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Q. Now, I will ask you, sir, if it is not correct that during your years with The Clorox Company—both of them—that this represents the first effort to attempt to feature a tie-in with the holiday season with Clorox bleach. A. I don't believe that that features the holiday season.

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(Tr. p. 1395)

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Q. I think maybe you better read them both, sir. I realize the problem. Please take your time. A. It says "Holiday" but I do not believe that is the first or only time that we have done that.

Q. All right, sir. Under those conditions I will ask you if you will produce for us any such similar tie ins during the months of November—October, November, and December, for the years 1953, 1954, 1955, and 1956.

* * * * *

Q. Now, Mr. Shaver, you have referred to Clorox advertising commencing around the first of 1958 as the "new look" advertising, have you not? A. Yes.

Q. And what is this new look that you refer to? A. It is the same copy claim, essentially the same copy statements with a—using a photographer instead of drawings,

(Tr. p. 1396)

and also a difference in the format of the advertisement. There is no essential change in the advertising whatsoever.

Neil Shauger—Direct

Q. Now, using live models rather than drawings is a considerably more expensive process, is it not? A. No.

Q. Isn't it true that the new theme of the ads features what is sometimes referred to today in the trade as a "togetherness theme," an entire family rather than the housewife, for example, all by herself? A. No more than in the past. We have often featured family groups; probably as frequently as not.

Q. Well, now, that presents a problem.

Well, now, what is the extent of this new look, then?

A. We simply wanted to make the advertising appear to be somewhat fresh so that they would—could become enthusiastic about a theme that had been continued constantly into the second or third year with no changes. We had to do something to dress up the format.

Q. Yes. I realize that was your objective, but I am not asking you about your objectives, sir. I am trying to find out what the new look is. A. A different format, live action photography instead of drawings, different headline treatment, but no essential change in the copy except the "Whitest for White" and the

(Tr. p. 1397)

"Brightest for Brighter." Those are the two changes in the copy.

Q. And as a change that was going from two-thirds to one-half a page ads to full page in magazines. A. By eliminating color we could afford to use larger space. That is correct.

Q. That would be a part of the new look, too, wouldn't it? A. Yes. I might add that we also discontinued a number of magazines which also gave us funds which would permit us to use larger space.

Hearing Examiner Haycraft: You mean you did not increase your advertising literature?

Neil Shaver—Direct

The Witness: No, sir.

Hearing Examiner Haycraft: The same budget you had in '56?

The Witness: Yes.

Hearing Examiner Haycraft: The same in 1957 as you have in 1958?

The Witness: Yes, roughly speaking. There may be small changes.

By Mr. Tincher:

Q. Of course, Mr. Shaver, the same amount of money that is now being spent for advertising compared to that spent prior to the acquisition, the amount you are now spending buys more space because of discounts you are receiving, does

(Tr. p. 1398)

it not? A. Our discounts in newspapers is \$2,000 out of an appropriation of \$1,400,000.

Q. So newspapers are \$2,000 cheaper—— A. That's right.

Q. (Continuing) ——under the present management than they were under the management of the Clorox Chemical Company? A. That's correct.

Q. And is that because there is a blanket rate for Procter & Gamble which includes The Clorox—— A. Yes.

Q. Now, is it your testimony, sir, and I am not trying to give you a hard time, but I just want to make sure we understand each other. Is it your testimony that in spending—how much do you spend for newspapers, first? Let me ask you that first. A. About \$1,400,000.

Q. And in spending that \$1,400,000 and using the Procter & Gamble blanket plan, the only savings are \$2,000? A. Correct.

Neil Shaver—Direct

Q. Can the savings be greater if Clorox so desires in the future, or if P & G so desires? A. No.

Q. Why not? A. At our present schedule we are getting the maximum

(Tr. p. 1399)

discounts now.

Q. Well, assuming you would find it desirable to change the schedules—you have changed schedules in the past, haven't you? A. Yes.

(Tr. p. 1400)

Q. Well, assuming you would find it desirable to change the schedules seeking more discount for that specific purpose—— A. I don't understand your question.

Q. All right, sir. I will be very happy to rephrase it.

In an effort to obtain a greater discount than \$2,000, with that as an objective—— A. Yes.

Q. (Continuing) ——could the present newspaper schedules be rearranged so that a far greater amount could be saved? A. I must qualify that. It is possible if we put more money into certain newspapers way out of proportion to the advertising schedule, it might be possible, but—in other words, we have our budget setup on the same number of spaces in each of the newspapers we use in the A, B and C schedules, and it wouldn't be logical to put any more space in any one newspaper to get a larger discount. I am not even sure there would be a larger discount obtainable.

Q. All right. Let me ask you if you have available to you in the Clorox Company the advertising books and records of Procter & Gamble, you would know where their advertising is and the frequency of that advertising? A. No.

Neil Shaver—Direct

Q. If you did have the advertising books and records of Procter & Gamble you would be able to be in conjunction with P & G's advertising so that you would be able to save far

(Tr. p. 1401)

more money than you are now saving, wouldn't you?

* * * * *

Hearing Examiner Haycraft: Do you understand the question?

The Witness: I think I do. It is hypothetical.

By Mr. Tincher:

Q. Right. If you know exactly where and when somebody is advertising and somebody is sharing a blanket rate with you, you can then plan your own advertising to take advantage of the maximum discounts available, can you not?

* * * * *

A. It would not be sound advertising practice. You are asking something that would be absurd from an advertising point of view because you buy media for this coverage and not discounts.

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(Tr. p. 1402)

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By Mr. Tincher:

Q. Mr. Shaver, let me give you an example that perhaps will do you better

Do various newspaper chains have a discount rate if you advertise in more than one of their papers?

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Neil Shaver—Direct

(Tr. p. 1403)

* * * * *

A. There is such a thing as the combination of the morning and evening newspapers. It means you have to advertise in both papers. I know of no chains that—network of newspapers—that permit discounts over and above the normal discounts allowed by all newspapers.

Q. Well, by "Chain" I meant that if a corporation or an individual owns newspapers in four or five cities and has a discount structure rate, say the same in all these cities in each group, can't you lump together your— A. I would imagine so if you wanted to use all four or five papers. Our decisions are determined by the markets we want to go in, not where the newspapers are.

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(Tr. p. 1405)

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Room 261,
United States Post Office,
Seventh & Mission Streets,
San Francisco, California.

April 17, 1958.

Met, pursuant to adjournment, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

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(Tr. p. 1407)

PROCEEDINGS

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(Tr. p. 1410)

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Neil Shaver—Direct

Neil Shaver

called as a witness for the Commission, having been previously sworn, testified further as follows:

DIRECT EXAMINATION (resumed)

By Mr. Tincher:

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(Tr. p. 1411)

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Mr. Tincher: Mr. Reporter, will you please mark as Commission's Exhibit for identification No. 418, a proof sheet of an advertisement of Clorox from the Erwin Wasey & Co., advertising, undated, except in the upper right-hand corner the words, the letters "1944" appear.

(The paper referred to was marked Commission's Exhibit 418 for identification.)

By Mr. Tincher:

Q. Mr. Shaver, I will hand you Commission's Exhibit 418 and I will ask you if that is the only such exhibit that you were able to find overnight relating to the question I asked yesterday as to special price reductions and that sort of thing. A. No; we were not searching for an advertisement of this type. This was run across accidentally and came over from our advertising agency with the other documents.

(Tr. p. 1412)

Q. At least, it is all you have to produce at this time; is that correct? A. On this subject, yes, sir.

Q. And apparently it was used in 1944; is that correct? A. Approximately.

(Tr. p. 1413)

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Neil Shaver—Direct

Mr. Tincher: I think I will offer that, Mr. Examiner.

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Hearing Examiner Haycraft: It may be received as Commission's Exhibit 418 in evidence.

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(Tr. p. 1414)

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Q. All right. Now, I would like for you to consider that period when you came to work in 1953, up to and through August 1, 1957, for the following questions:

I ask you first if during that period the Clorox Chemical Company ever utilized or distributed any price reducing coupons to the consuming public? A. Yes.

Q. When? A. In 1956.

Q. Can you tell us where, in this vast collection of records, we can find that?

Mr. Royall: Objection.

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(Tr. p. 1415)

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Hearing Examiner Haycraft: Well, I will ask the witness if he can produce anything to support that statement.

Do you have a recollection of that?

The Witness: Because of my unfamiliarity with these documents, sir, I can't say that I could produce them now.

Mr. Royall: Well, your Honor, I don't think the witness understands.

You don't mean right at this minute; you mean you could produce it at some time later?

The Witness: Oh, yes.

Hearing Examiner Haycraft: Just let it ride at that.

Mr. Tincher: All right, sir.

Neil Shaver—Direct

Mr. Royall: He says he can produce it at some time later.

By Mr. Fincher:

(Tr. p. 1416)

Q. Now, I will ask you the same question with respect to price saving labels such as were used in Erie, Pennsylvania, and Evansville, Indiana, in the fall and winter months of 1957 by The Clorox Company. A. No, sir.

Q. The same question with respect to——

Mr. Royall: Your Honor, I don't know what the same question is, whether he can find it in these records——

Hearing Examiner Haycraft: He didn't ask that question. That was my question. He asked the question whether or not from the period 1953, up to August 1957, such a thing happened.

Mr. Royall: Well, if that's the question, I think it ought to be clear in the record.

Hearing Examiner Haycraft: I think it is clear, Mr. Royall. I think the witness understood that question.

Mr. Tincher: All right. Now, let's see. I have an unanswered question.

Hearing Examiner Haycraft: He said——

The Witness: I said "No" in answer to your last question.

By Mr. Tincher:

Q. Which was on price reducing labels? A. Yes.

Q. All right, sir. Now, during that same period of time did

(Tr. p. 1417)

The Clorox Company give any——

Hearing Examiner Haycraft: Clorox Chemical.

Mr. Tincher: Right, sir. Thank you.

Neil Shaver—Direct

By Mr. Tincher:

Q. Did The Clorox Chemical Company give or distribute any premiums to housewives or consumers, either self-liquidating or otherwise? A. No.

Q. And during that same period of time did The Clorox Chemical Company have any consumer contest, and by that I mean a contest where consumer or purchaser could send in a label or something of that nature and win a larger prize? A. No.

Q. And during that period of time did The Clorox Chemical Company distribute or mail free samples of Clorox to the consuming public as distinguished from special groups, such as new mothers, and that sort of thing? A. Yes.

Q. And what was that occasion? A. That was through cooking school demonstrations essentially.

Q. Yes, sir. I was attempting to distinguish from that sort of thing as being a special situation. What I had in mind was just to the general public, house to house or mailing through the mails, just for the public at large;

(Tr. p. 1418)

delivering door to door. A. No.

Q. And during that same period of time was Clorox ever tied in with another product, and by that I mean was Clorox given free or at half price if somebody bought the other product, or was the other product given free or at half price if somebody bought Clorox? A. No.

(Tr. p. 1421)

By Mr. Tincher:

Q. All right, sir. Now, I would like to ask you a question and, without revealing any figures on this record, accord-

Neil Shaver—Direct

ing to my computation the amounts given there for advertising for the month of July 1957, which is the only month breakdown on that exhibit, or any that we have to my knowledge, appear to be considerably higher than the yearly totals which are given, divided by 12. Can you explain to us why the amount there in July would be considerably higher than the average monthly amounts for the years given? A. The month of July is one of our largest selling months. The bleach industry as a whole reaches a peak in July and August, and at that time we advertise because the business is generally higher at that time.

Q. Does The Clorox Company have any national television shows, as distinguished from television spots? A. No.

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(Tr. p. 1422)

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Q. Mr. Shaver, can you give us the periods of time in Erie, Pennsylvania, and Evansville, Indiana, where the reduced price label of Clorox was offered by the Clorox Company? A. In Erie it was during the month of November; Evansville, it was February, I believe.

Hearing Examiner Haycraft: February of this year?
The Witness: Yes, sir.

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(Tr. p. 1424)

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Q. Now, was there an offer of a premium in Erie after the price off the label situation? A. Yes, there was.

Q. And when did that take place? A. In the month of January, 1958.

Q. Now, the same question with respect to Evansville?

Neil Shaver—Direct

A. No, there was no self-liquidating premium offered in Evansville.

Q. Was there a free premium offered? A. No.

Hearing Examiner Haycraft: What was the offer?

The Witness: It was two, four, and six cents off.

Hearing Examiner Haycraft: On the bottle?

The Witness: On the bottle, yes.

Hearing Examiner Haycraft: To the consumer?

The Witness: To the consumer, yes, sir.

Hearing Examiner Haycraft: For what period of time?

(Tr. p. 1425)

The Witness: Approximately one month.

Hearing Examiner Haycraft: The month of February?

The Witness: The month of February, sir.

By Mr. Tinch:

Q. And that is the only special situation above and beyond ordinary prices that occurred in Evansville from the time Clorox was purchased by The Procter & Gamble Company? A. I believe we equalized the advertising effort in that area.

Hearing Examiner Haycraft: What do you mean by that?

By Mr. Tinch:

Q. What does that term mean, sir? A. What I mean by that is that we increased our advertising effort to the level established by a competitor, but no higher.

Q. Would that be television or radio? A. Television, newspapers.

Hearing Examiner Haycraft: I still don't understand what you mean by "equalize."

The Witness: If you can establish what your competitor is investing in advertising in an area and your budget is

Neil Shaver—Direct

running lower than that figure, it would be equalizing to bring it up to approximately the same amount of money spent by your competitor.

(Tr. p. 1426)

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By Mr. Tincher:

Q. The premium was an ironing board cover, sir; is that right? A. Yes, we had an ironing board cover premium.

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(Tr. p. 1432)

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Q. Now, Mr. Shaver, would you help us some more, sir, and tell us what products the Fall housecleaning drive is intended to promote?

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(Tr. p. 1433)

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A. The housecleaning promotion was intended to promote Clorox. That was the product.

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Q. Well, of course, that is obviously correct, sir, but the Fall and Spring housecleaning drives refer to related products which can be tied in and boost sales of all the products, do they not? A. Yes. We never use the word "tie-in." We speak of related items.

Q. I see, sir. And what are those related items? A. Generally high margin items such as brooms, mops, waxes, polishes.

Q. That is all? A. Yes.

Hearing Examiner Haycraft: Are they also slow-moving?

Neil Shaver—Direct

The Witness: Generally slow-moving items.

Hearing Examiner Haycraft: The idea is that Clorox will help them to sell?

The Witness: We base quit a bit of our presentation that Clorox is a traffic builder in the store.

(Tr. p. 1434)

The consumer isn't likely to get back into the broom section very often unless he is looking for a specific product that has a faster rate of turnover, so we use the house-cleaning promotion, essentially to stimulate sales and essentially in the stores where there isn't much traffic or movement.

Hearing Examiner Haycraft: Now, that must be an appeal to the distributor and the wholesaler rather than the consumer?

The Witness: Yes.

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(Tr. p. 1436)

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Q. Now, are you familiar with the new type bottles introduced by the Clorox Company? I have reference to the quart-size bottles. A. Yes, I am.

Q. And when were those bottles introduced? A. I believe in January of 1958. However, I don't think your use of the word "introduced" is right. I think that it would be "tested."

Q. Right, sir. Splendid. And when were they tested? A. January 1958.

Q. And where were they tested, sir? A. They were tested in Atlanta and in Buffalo.

Q. Were they tested in Erie, Pennsylvania, and Evansville, Indiana? A. No.

Neil Shaver—Direct

Hearing Examiner Haycraft: What is the difference between them?

(Tr. p. 1437)

The Witness: A very minor addition to the top of the bottle. It has a loop connected to the neck of the bottle and makes it possible for the bottle to be handled more conveniently and poured more conveniently.

Hearing Examiner Haycraft: You mean a little handle that you put your finger through, like a syrup bottle?

The Witness: That's correct. We wanted to test how effective it would be for Clorox.

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(Tr. p. 1441)

By Mr. Tincher:

Q. Now, Mr. Shaver, in 1958 the Clorox Company ran two-page ads in color in trade journals, did it not? A. Correct.

Q. Now, isn't it a fact that The Clorox Chemical Company had not followed such a procedure? A. That is incorrect. The Clorox Company had used two pages in color in trade papers since 1956.

Hearing Examiner Haycraft: Clorox Chemical Company?

The Witness: The Clorox Chemical Company.

By Mr. Tincher:

Q. And are those trade papers the same seven trade papers? A. The same seven trade papers.

Hearing Examiner Haycraft: The trade papers of wholesale grocers?

The Witness: Do you want the names of them, sir?

Neil Shaver—Direct

Hearing Examiner Haycraft: No, just in general, by trade.

(Tr. p. 1442)

The Witness: Just trade papers sent to the various types of different trade store operators. There is chain store merchandising and super market merchandising and cooperative and voluntary groups, independents.

By Mr. Tincher:

Q. When did The Clorox Company—when did Clorox start being featured by Clorox ads in newspapers? A. In my knowledge, in 1956; and probably previously; although I am not sure of that.

(Tr. p. 1444)

Q. Mr. Shaver: While we are speaking of full page magazine ads, what determines the frequency that these ads are run? In other words, we had a period from August through March

(Tr. p. 1445)

where only during one month they were run; is that correct? A. That's correct.

Q. I say the full page ads in these four magazines will appear in the April issues, the current issues? A. April, May, and June.

Q. Three months? A. Yes.

Q. And then will they taper off again and not appear until— A. No. They will continue. You have to remember that in the entire year of 1957 we alternated our advertisements so that any one magazine was used every other month. We had a list of 14 magazines. In January

Neil Shaver—Direct

we were running seven, in February another seven, in March back to the first seven. So we were only in six times a year in any magazine for the last five years.

From January '58, we will be running eight times in four magazines, a smaller number of magazines.

Q. And the ones dropped are the ones with the smallest circulation, are they not? A. I'd have to see the circulation figures to answer that. That was no criteria.

Q. I didn't asked you if it was a criteria. As a matter of

(Tr. p. 1446)

fact, you don't know?

Hearing Examiner Haycraft: I think his question was what is the policy of determining where it appears.

The Witness: The type of coverage of the magazine. For example, some magazines are called "shelter magazines" and some feature recipes for womens service purposes. They are selected on the basis of the audience that reads them, with a minimum of duplication. We would not take two of the same type of magazine.

By Mr. Tincher:

Q. Would another factor which might have contributed to this, sir, have been the fact that the four magazines finally selected were magazines in which The Procter & Gamble Company advertises very extensively. A. That had absolutely nothing to do with the decision. What you say may be true, but I do not even know that it is true.

Q. While we are on that point, let me ask you: Do you or anyone else in The Clorox Company have any advance schedules or information from Procter & Gamble or from any of its advertising agencies about when, where, or how Procter & Gamble will be advertising? A. Nothing whatsoever.

Neil Shaver—Direct

Q. And do you furnish any such information to Procter & Gamble?

(Tr. p. 1447)

A. After our decision has been made we notify them.

* * * * *

Q. You, of course, as advertising manager, Mr. Shaver, are familiar with Clorox advertisements and recognize them when you see them? A. Yes, I should recognize them.

Mr. Tincher: Mr. Reporter, would you please mark as Commission's Exhibit 420 for identification Page 22 of the Times News of Twin Falls, Idaho, Thursday, October 24, 1957, and I will tell counsel so he will know what I am relying on, that I am relying on the entire food ad of the A. G. Food Markets.

(Tr. p. 1448)

* * * * *

By Mr. Tincher:

Q. Yes. My question is this: Is that not a Clorox advertisement in that ad? A. No. This is an A. G. advertisement.

Q. I am not asking you who sponsored it. I am asking you if that is not an advertisement of The Clorox Company products? A. No, sir, it is not. It is an advertisement of this

(Tr. p. 1449)

food market.

Q. That is who it is sponsored by? A. Right.

Q. We are both agreed on that. Now, my question is this: Isn't that advertising the product Clorox rather than Baby Ruth or something like that? A. It is advertising Clorox.

Neil Shaver—Direct

Q. And you recognize it as the advertising of Clorox, regardless of who sponsored it? A. Correct.

Mr. Tincher: I offer the advertisement, sir.

Mr. Royall: Let me see it. Your Honor, we object to that. We have no control over what they advertised in a particular store.

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(Tr. p. 1451)

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Hearing Examiner Haycraft: Well, do you notice the item in this ad entry blank here for Procter & Gamble, \$60,000 Lifesaver contest—?

Mr. Royall: I didn't see that, your Honor.

Hearing Examiner Haycraft: When you read that, you might not have any objection to the ad. On that ground anyway. You might object to it on some other ground.

Mr. Royall: I am going to withdraw my objection, your Honor, and let my argument go to the weight, on the question that he has offered it for.

Hearing Examiner Haycraft: All right. The objection is overruled and Commission's Exhibit 420 is received in evidence.

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(Tr. p. 1452)

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By Mr. Tincher:

Q. Do you have any knowledge of where the Clorox Chemical Company or The Clorox Company ranks in the list of the

(Tr. p. 1453)

nation's advertisers? A. The Clorox Company was among the 100 top advertisers in the country in 1956.

* * * * *

Neil Shaver—Direct

By Mr. Tincher:

Q. What is the basis of your knowledge, sir? A. A compilation made by "Advertising Age" magazine.

Hearing Examiner Haycraft: Where does Procter & Gamble stand in that?

Mr. Royall: Objection, your Honor.

Hearing Examiner Haycraft: Objection overruled.

The Witness: Do I have to answer your question, sir?

Hearing Examiner Haycraft: Yes.

The Witness: Not the first.

Hearing Examiner Haycraft: I am asking you where it did stand.

Mr. Royall: If he knows.

Hearing Examiner Haycraft: Because I was about to take official notice of that. I have read somewhere—I don't know where it was, whether it was "Fortune" magazine or

(Tr. p. 1454)

some other place—that they were.

Mr. Tincher: Maybe it was our complaint, sir.

Hearing Examiner Haycraft: Where is your recollection of where they did stand?

The Witness: Second or third, I believe.

Hearing Examiner Haycraft: Who was the largest, who was first?

The Witness: General Motors.

By Mr. Tincher:

Q. That was for 1956? A. Yes, sir.

Hearing Examiner Haycraft: '57?

The Witness: I believe it was '56. I am not sure. I can't answer on '57.

Mr. Royall: Will you give me a series of objections, an objection to this whole line?

Neil Shaver—Direct

Hearing Examiner Haycraft: You may have an objection, a running objection to all of them. And it is overruled.

By Mr. Tincher:

Q. The "Advertising Age" and others show that Procter & Gamble was first and General Motors was second, do they not?

Mr. Royall: Objection.

Hearing Examiner Haycraft: I will sustain the objection.

(Tr. p. 1455)

I don't know, I think it is true, I really don't know, but I think you fellows are ahead right now.

Mr. Royall: I don't know, sir.

Hearing Examiner Haycraft: I don't know, either, but I have read it somewhere.

Mr. Royall: It would be utterly immaterial. That is not the issue in this case.

Hearing Examiner Haycraft: It is just one little piece of evidence they are putting in.

Mr. Tincher: This is our "Bigness is Badness" case.

Mr. Royall: I am glad you told us that. I suspected that is what it was.

Mr. Tincher: I quoted the Chairman of your Board.

Mr. Royall: I think that is all there is in it, too.

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(Tr. p. 1456)

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By Mr. Tincher:

Q. Since January of 1958 every advertisement placed for Clorox by Honig-Cooper Advertising Agency contains the—with newspapers, of course—contains the notation,

Neil Shaver—Direct

and I will quote, if I may: "Space covered by this order is for the Clorox Company, a wholly owned subsidiary of The Procter & Gamble Company. Rates as per blanket contract."

(Tr. p. 1457)

Is that correct? A. Yes.

Q. And that information is utilized by the agencies involved and the newspapers to compute the discounts which should be applied; is that correct?

Mr. Royall: I object.

Hearing Examiner Haycraft: Overruled.

A. Yes.

* * * * *

(Tr. p. 1462)

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By Mr. Tincher:

Q. Now, Mr. Shaver, what has been the savings reported to The Clorox Company on radio advertising by virtue of discounts and Procter & Gamble product grouping?

Mr. Royall: Your Honor, before he answers this, I want to say that Mr. Shaver said in answer to one of their questions, and as I previously intimated in a statement to the Court, there are a number of computations that were made after Mr. Morgens' examination and when he did not have full information, which we will offer when our evidence comes on. I don't know whether Mr. Shaver knows anything except what they have told him, but if he did we would prefer to give, as we planned, that information with supporting data.

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(Tr. p. 1463)

* * * * *

Neil Shaver—Direct

By Mr. Tinch:

Q. What has been reported to you by the Procter & Gamble Company?

Hearing Examiner Haycraft: What have they reported to you, Mr. Shaver?

The Witness: A saving of about \$500 in radio, around \$50,000 in magazines, \$86,000 in television.

(Tr. p. 1469)

By Mr. Tinch:

Q. As Commission's Exhibit 422 for identification, a proof sheet of a Clorox ad, and written in ink at the bottom December 15 and 16, 1955, and as Commission's 424 for identification a proof sheet of a Clorox ad written in ink at the bottom, November 17 and 18, 1955.

(The papers referred to were marked Commission's Exhibits 422, 423, and 424, respectively, for identification.)

(Tr. p. 1471)

Hearing Examiner Haycraft: Commission's 422, 423, and 424 may be received in evidence.

(Tr. p. 1483)

Mr. Tinch: Mr. Reporter, will you please mark as Commission's 429 A, B, and C, a three-page stapled document, Page A being dated January 24—

Neil Shaver—Direct

Page A being dated January 24, 1958, addressed to the Paul P. Kroehle Company at Cleveland, Ohio. There is a street address if you want it, sir

And Page 2 bearing the identification that Neil Shaver is the author.

Hearing Examiner Haycraft: That is B?

Mr. Tincher: That is right, sir. And Page C being attached to the letter, being a promotional piece to be sent—and entitled "To Be Sent" on distributor's letterhead to trade contacts only in areas served by promotion.

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(Tr. p. 1484)

(The papers referred to were marked Commission's Exhibit 429 A, B, and C, for identification.)

By Mr. Tincher:

Q. Now, Mr. Shaver, I will hand you Commission's Exhibit 429 A, B, and C, and ask you if this is a letter you sent to this particular distributor.

* * * * *

The Witness: Yes, in answer to your question.

Mr. Tincher: I will offer the exhibit now, sir.

Hearing Examiner Haycraft: Any objection?

Mr. Royall: No objection, your Honor.

Hearing Examiner Haycraft: It may be received as Commission's Exhibit 429 A, B, and C.

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(Tr. p. 1485)

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Q. I will show you Commission's Exhibit 407 listing Clorox TV spots. You will notice it starts with the Clorox Chemical Company on July 22, '56. Is that the exact time The Clorox Chemical commenced the use of TV spots?

Neil Shaver—Cross

A. That is correct.

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(Tr. p. 1486)

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Mr. Tincer: Mr. Examiner, before we finish with this witness, counsel gave me a number of proofs of newspaper advertisements on the issue of what I termed the "family togetherness." After looking at these various advertisements I find that my statement to the witness suggesting that this form appeared first in December of '57, or at least some time subsequent to the acquisition, is incorrect and that the family theme had been used prior to the acquisition. And I make that statement with reference to the exhibit given me by counsel.

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(Tr. p. 1487)

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CROSS-EXAMINATION

By Mr. Royall:

Q. Mr. Shaver, you produced three items at the beginning of the hearing this afternoon. Do you know whether or not there were or might be other promotional items of the type described in the testimony this morning prior to 1957 and prior to the time that you came in with the company? A. Yes.

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(Tr. p. 1488)

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Q. Do you know whether or not there are others? A. Yes, I do know. There were others.

Q. But you do not—you cannot identify them or describe

Neil Shaver—Redirect

them at this time; is that right—fully?
describe some of them, yes, sir.

A. I could de-

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(Tr. p. 1489)

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REDIRECT EXAMINATION

By Mr. Tincher:

* * * * *

(Tr. p. 1490)

* * * * *

Q. You say that prior to your employment, in what month of '53? A. March.

Q. Do you know that prior to that there were other promotions? A. Yes.

Q. And in what years were they? A. They extended, to my knowledge, from 1930 to 1952, throughout the entire period.

Q. Were they the same type of promotions we have just been discussing, the cooking schools, the home art guilds?

A. No. For example, there was a quart bottle of Clorox given free with the purchase of a half-gallon bottle.

Q. When? A. 1944.

Q. Let me ask you, then, sir. What, of your knowledge, was given along those lines in 1952 and in the early part of 1953, prior to the date of your employment? A. There were trade allowances.

(Tr. p. 1491)

Q. I am talking about things that reached the consumer directly, sir, things like special prices to consumers, special allowances to consumers, premiums or contests for consumers.

* * * * *

Neil Shaver—Redirect

A. In Buffalo, New York, there was a coupon allowing so much off of each bottle of Clorox—

Q. And when was that, sir? A. I cannot answer that.

Q. You don't know whether it was 1/252 and 1/253 or not?

A. I am quite sure it was before those dates.

Q. Now, I am going to give you all the time you need, sir. Have you finished your answer?

(Tr. p. 1492)

A. Are you still confining me to '52-'53?

Q. Right. A. No, I can't think of any.

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(Tr. p. 1494)

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Bernard F. Trimpe,

recalled as a witness for the Commission, having been previously sworn, testified further as follows:

FURTHER DIRECT EXAMINATION

By Mr. Tincher:

Q. Mr. Trimpe, can you tell us why the ironing board cover premium was offered in the Erie County area and why it was limited to that area? A. Yes, I can.

Q. All right. Tell us, please. A. One of our competitors decided to—

Hearing Examiner Haycraft: Who was it?

The Witness: Purex.

Hearing Examiner Haycraft: All right.

By Mr. Tincher:

Q. Go ahead. A. Purex came into Erie County, Pennsylvania, with quite

Bernard F. Trimpe—Direct

(Tr. p. 1495)

an extensive advertising promotional consumer coupon campaign together with the introduction of a new type container, and this was the first time they had entered that market, and their intention was, according to their sales people in the trade, that this was a test for them to further enter into the Eastern markets of liquid bleach.

* * * * *

A. So we looked at it very carefully and after we had studied from the announced campaign advertising in others, coupons and so forth, what we should do, we took immediate steps to try to protect our business in that area, and we did do that and one of the things we did was in February we announced an ironing board cover premium and limited to that territory because we were trying to defensively protect

(Tr. p. 1496)

our business in the Erie County area.

By Mr. Tincher:

Q. Now, this knowledge of what the intent was was based on what somebody told you. Who was that? A. Well, our representative in the area, Paul E. Kroehle Company.

Q. And he got the information allegedly? A. Mr. Roy Osmond was the general Manager of that operation, and he provided us with a copy of the Purex brochure, which stated—showed a picture of the new bottle and stated on the brochure the fact that they were going to do this certain amount of advertising. It stated explicitly on the brochure how much.

Q. No. I am talking and limiting myself now to the intention of going elsewhere. A. I am sorry.

Bernard F. Trimpe—Direct

Q. That was—— A. He called on the direct buyer, and the direct buyer gave him this brochure and in the process of that stated that it had been told to him that this was a test on the part of the Purex Company and that they had definite plans to use this if it were successful to enter into the Eastern markets.

Q. The direct buyer being a grocer? A. A Chain or a wholesaler. I don't remember which.

Q. Do I summarize it correctly when I say what you know is

(Tr. p. 1497)

based allegedly on what a Purex man told a dealer, who in turn told your distributor, who in turn told you? A. Yes, that's correct.

Mr. Tincher: Mr. Examiner, I certainly renew my motion to strike.

Hearing Examiner Haycraft: Motion denied.

Is that what prompted you to do what you did?

The Witness: That is what prompted us to do what we did.

Hearing Examiner Haycraft: That's the answer to it. I can't take it as the proof that either the Purex did what——

Mr. Tincher: I see you are right.

Hearing Examiner Haycraft: I am taking it for the reason for this witness doing what he did, which makes it an exception to the hearsay rule.

Mr. Tincher: The statement was made, and not that it is true; right?

Hearing Examiner Haycraft: Yes.

Mr. Tincher: I didn't realize that, sir. I am sorry.

By Mr. Tincher:

Q. Now, of course, the Purex introduction was in October or November of 1957, wasn't it? A. October, yes.

Bernard F. Trimpe—Direct

(Tr. p. 1498)

Q. And you first came out with the 3, 5 and 7 cent off?

A. Yes.

Q. And that lasted awhile before this last introduction or the ironing board cover? A. Correct.

Q. Did you do anything after the ironing board cover campaign? A. No. We have our Spring promotion which is breaking in the North this next week, I guess, and it has a self-liquidating premium on it.

Q. How long did the ironing board cover last, or was it still in the last campaign on it? A. It lasted longer than we wanted it to, but—no. It was through about the time we introduced our Spring campaign.

Q. Just about that time? A. Yes. A little before that.

Hearing Examiner Haycraft: Have you got an ironing board cover in this Spring campaign?

The Witness: No. We have a dampening bag.

By Mr. Tincher:

Q. Can you tell us, sir, if this was used in Evansville, Indiana? A. No, it was not used in Evansville, Indiana.

Q. How about Wichita or Louisville? A. No.

Q. Just the Southeast part of the United States and Erie,

(Tr. p. 1499)

Pennsylvania? A. And Erie, Pennsylvania, that's correct.

Q. Mr. Trimpe, I will show you Commission's Exhibit 403 and refer you to the category entitled "Consumer—Cents Off" and I will inform you this exhibit is in camera, so you don't mention any figures.

* * * * *

Bernard F. Trimpe—Direct.

A. This is more in the accounting end, but I think it represents the amount of money less realization, is what we call it. I am sure it is, because it's from August to December and that's what we call them, consumer cents off,

(Tr. p. 1500)

and it represents how much less in dollars we received as a result of having the labels in that market.

Q. All right, sir. Thank you. And let me refer you to the category entitled special packs and ask you what that category means? A. Well, it is in contrast to the other. This represents, I guess, the cost of packing the ironing board cover materials down in our plants in the Southeast and—let's see.—August to December—I suppose the extra costs, if any, of packing the 3, 5 and 7 cent labels in Erie, and I guess that would be it.

Hearing Examiner Haycraft: Let's see the exhibit.

The Witness: Yes, sir.

Hearing Examiner Haycraft: You said you guess. Can you do any better than guess?

The Witness: Well, he said not to mention figures. The first one I am very certain represents the amount of less realization and sales. And I say guess only because I don't know the exact figure. But it looks about like the figure which was called to my attention as the cost of preparing those packs, and I think that's correct.

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(Tr. p. 1501)

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By Mr. Tincher:

Q. Mr. Trimpe, you testified yesterday that the premium for the Spring-'58 drive would come from Procter & Gamble in Cincinnati. Let me ask you if the redemption on the ironing board covers did not also come from Procter &

Bernard F. Trimpe—Direct

Gamble in Cincinnati, Ohio, or was handled by Procter & Gamble? A. Yes. That was handled by their redemption center.

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(Tr. p. 1509)

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Mr. Tinch: Mr. Reporter, will you please mark as Commission's Exhibit 437 a document entitled "Freight as Percentage of Gross Sales Price per Case." My understanding is—and please correct me if I am wrong, Mr. Royall—we

(Tr. p. 1510)

may state that this is prepared from the books of the Clorox Company and The Clorox Chemical Company showing the information indicated thereon for the years indicated.

Mr. Royall: That's all right.

(The paper referred to was marked Commission's Exhibit 437 for identification.)

Hearing Examiner Haycraft: Do you offer it in evidence?

Mr. Tinch: Yes, sir, I now offer it.

Hearing Examiner Haycraft: Any objection?

Mr. Royall: No, sir.

Hearing Examiner Haycraft: There being no objection, Commission's 437 for identification is received in evidence.

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(Tr. p. 1516)

* * * * *

Room 229
Federal Building,
Los Angeles, California.
April 21, 1958.

Alan C. Stoneman—Direct

Met, pursuant to adjournment, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

* * * * *

(Tr. p. 1518)

PROCEEDINGS

* * * * *

Alan C. Stoneman

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Haycraft: What is your full name?

The Witness: Alan C. Stoneman.

* * * * *

DIRECT EXAMINATION

By Mr. Tinch:

Q., Mr. Stoneman, you state for the record, please, what company you are affiliated with? A. Purex Corporation, Ltd.

(Tr. p. 1519)

Q. What is your position with that company, sir? A. I am president of the Purex Corporation.

Q. How long have you been president? A. Since October of last year.

Q. How long have you been with the Purex Company? A. For sixteen years.

Q. Can you describe for us briefly your duties during that period of time, and your experience? A. I joined the company in 1941 as vice president of the wholly-owned subsidiary, Rayo Chemical Corporation. I became an officer of the Purex Corporation in 1944. I was elected

Alan C. Stoneman—Direct

executive vice president and director in 1946, and president in October of 1957.

Q. Can you tell us, once again as briefly as possible, what your duties consist of as president of the Purex Corporation?

A. My duties are to direct the operations of the corporation within the policies and the budgets approved by the Board chairman and the Board of Directors, and to coordinate the activities of all the operating heads, including sales, advertising, market research, production, production research, and finance.

Q. Can you tell us the length of time that the Purex Corporation, Ltd. has been in business? A. Purex Corporation, Ltd. was organized in 1930. It was the off-shoot of the Purex Chemical Company, which dates back

(Tr. p. 1520)

to 1924.

* * * * *

Q. That is the next question, sir. Mr. Stoneman, can you

(Tr. p. 1521)

tell us in general terms the brand names of your products and the type of product for each brand? A. Purex original product as Purex Liquid Bleach. It also manufactures Drano, which is a bowl cleaner which is distributed regionally in the West. It also manufactures and distributes Dry Trend, which is a light duty synthetic detergent, and Liquid Trend, a light duty liquid synthetic detergent. Dry Bleach, Beads-O' Bleach is manufactured and distributed nationally. News, a heavy duty detergent is distributed locally.

* * * * *

Q. By locally, you mean in the California area? A. The California area and Arizona, and in addition, we have

Alan C. Stoneman—Direct

Sweetheart soap, a nationally distributed toilet soap; Old Dutch Cleanser, a nationally distributed friction cleanser, and Blue White bluing, a combination synthetic bluing product.

Q. Is the Dutch Cleanser a powdered cleanser? A. Yes.

Q. And is Sweetheart soap a bar soap? A. That is a bar soap.

Q. Can you tell us, Mr. Stoneman, approximately what percentage of your company's total business is accounted for by the sale of liquid bleach?

(Tr. p. 1522)

A. It's about 27 percent; I think the exact figure is 27½ per cent currently.

Q. Can you tell us approximately what percentage—or let me ask you first, if I may, does your company produce private labels of bleach in addition to the bleach designated as Purex? A. Yes, it does.

Q. Approximately what percentage of your business is that? A. Less than one and a half percent.

Q. Does your company produce any commercial or swimming pool bleach? A. Yes, it does, in certain limited areas; Southern California, the Bay Area, that is, the San Francisco Bay area, and a small amount of it in Dallas, Texas.

Q. Is that a sodium hypochlorite bleach? A. Yes.

Q. What percentage is the solution in it? A. You mean the strength of the solution or percentage of sale?

Q. The strength of the solution? A. It varies from 10 to 16 percent.

Q. Does the Purex Corporation consider the commercial bleach competitive with the household type bleach?

* * * * *

Alan C. Stoneman—Direct

A. No, we don't consider it competitive. It represents a
(Tr. p. 1523)

very small percentage of our sales, about one percent is all.

By Mr. Tincher:

Q. Can you tell where the Purex Corporation produces liquid bleach? A. Yes. We produce liquid bleach in South Gate, California, San Leandro, California; Tacoma, Washington; Dallas, Texas; Memphis, Tennessee; St. Louis, Missouri; and Atlanta, Georgia.

* * * * *

Q. Mr. Stoneman, in the Southeastern part of the country, do you have only the one plant at Atlanta, Georgia?

A. Yes.

Q. Is there any particular reason, sir, for your company having different bleach plants at various points in the United States rather than having it at one central or one given point? A. Yes, there is a very good reason. Bleach is a very heavy commodity in relation to its selling price. A case of bleach weighs between 40 and 50 pounds and sells for about \$2.00; hence, no plant can service an area more than—can service a radius of about 300 miles from the plant economically.

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(Tr. p. 1524)

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Q. Will you tell us what your sales area is in the United States for liquid bleach? A. Our sales area is substantially the area west of the Mississippi and south of the Ohio; but you must add to that area a portion of Wisconsin, Southern Illinois, and Southern Indiana. We do not sell in Pennsylvania and the Virginias.

Alan C. Stoneman—Direct

Hearing Examiner Haycraft: You mean by that West Virginia and Virginia?

The Witness: We do not sell in Pennsylvania, the Virginias, the Carolinas or Southern Florida.

By Mr. Tincher:

Q. Mr. Stoneman, has your company ever computed or made any effort to compute the percentage of the United States population that resides within your sales area for liquid bleach?

* * * * *

The Witness: We estimate that the population in our sales area represents about 48 percent of the national

(Tr. p. 1525)
population.

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Hearing Examiner Haycraft:

* * * * *

Do you sell at all in New England or New York?

The Witness: No, sir, not liquid bleach.

Hearing Examiner Haycraft: You didn't mention it.

The Witness: When I excluded the area—south of the Ohio is a rather indefinite term, but we exclude Pennsylvania and the Virginias and all areas north of that.

Hearing Examiner Haycraft: With the exceptions that you have indicated?

The Witness: That's right.

By Mr. Tincher:

Q. Mr. Stoneman, you tell us, what are the competitive factors which your company faces in selling liquid bleach?

* * * * *

A. The competitive factors in the sale of liquid bleach are comparative to the competitive factors that exist in the

Alan C. Stoneman—Direct

whole cleanser business or detergent business, and they are first advertising, and it's all types of advertising. Do you want them enumerated?

By Mr. Tincher:

Q. Yes, why don't you, sir? A. The television networks, television spots; radio network,

(Tr. p. 1526)

radio spots; newspapers, comics, Sunday supplements, magazines, color, and black and white; billboards.

Another important competitive factor is sampling, free samples. Coupons are important competitive factors, coupons that offer the consumer cents off on a purchase. The sales service or the merchandising service, that is ordinary by the manufacturer at the retail level, is an important factor; promotions, whether they be in the form of consumer promotions or dealer promotions, there are two types and there are many varieties of promotions. They are important competitive factors. The shelf space in retail stores is important and there are others, such as the quality of the package, the quality of the product, the price, and so on.

(Tr. p. 1527)

Q. Could you give us some examples of what you had in mind when you mentioned consumer promotions? A. Well, these promotions might take the form of ten cents off on a package. It might take the form of a half-price sale; two units for the price of one and a half. It might take the form of a one-cent sale, where four units are sold for the price of three, plus one cent; or three units are sold for the price of two, plus one cent. It might take the form of companion products: Ten cents off on your favorite pound of coffee if you buy a package of "X" brand.

Alan C. Stoneman—Direct

You can go on indefinitely on that subject, so I don't think—if you needed any more illustrations, I will be glad to give them to you.

* * * * *

(Tr. p. 1538)

* * * * *

By Mr. Tinch:

Q. Mr. Stoneman, is your liquid bleach sold under the Purex brand name? A. Yes.

Q. Is it a sodium hypochlorite solution? A. Yes.

Q. Could you tell us the percentage of solution strength of it? A. It is labeled 5¼ percent. It is manufactured at slightly higher strength.

Q. What is the remainder of the product, sir? A. The remainder of the product is water.

Q. Are you familiar with whether other liquid bleaches which are offered for sale in your sales area are substantially or nearly the same product as yours?

(Tr. p. 1539)

A. Yes. The liquid bleaches are substantially the same product.

Q. Does the Purex bleach have any special or unique properties which aid it competitively? A. Purex bleach is manufactured by a process which we call the interfill process.

Hearing Examiner Haycraft: What?

The Witness: Interfill.

Hearing Examiner Haycraft: Will you talk a little louder, please?

The Witness: This is a secret process. It is a means of filtering the bleach to eliminate impurities. It aids the end product insofar as stability is concerned. It tends to main-

Alan C. Stoneman—Direct

tain its shelf life at higher strength over longer periods of time.

By Mr. Tincher:

Q. Let me ask you if you have any knowledge of whether other liquid bleaches have any special properties or chemical advantages as far as quality is concerned? A. I don't know. The products, as they appear on the retail shelf, are substantially the same. The products made by the major manufacturers in the bleach field are substantially the same.

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(Tr. p. 1540)

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Q. Is the production of liquid bleach a highly technical process? A. No, it is relatively simple.

Q. Do you know if any new uses are being discovered or developed for liquid bleach? A. Liquid bleach is more than 150 years old, so, most of its uses are pretty well known.

Q. Does your company list the various uses of liquid bleach on its products' labels? A. Some of them.

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(Tr. p. 1541)

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A. The principal use for liquid bleach is in the laundry. It is used for the laundering of cottons and fine fabrics, if it is used in accordance with strict directions. Bleach is sodium hypochlorite, which is really a strong Dakin's solution. It is a powerful germicide. It can be used to disinfect garbage cans, toilets, kitchen sinks. It can be used—it is used by some people in bathing. It is used to clean out refrigerators; it is used in the sick room, in the washing of dishes and other utensils.

Alan C. Stoneman—Direct

Is that sufficient?

Hearing Examiner Haycraft: Go ahead.

By Mr. Tincher:

Q. Of these various uses you have mentioned, sir, is there any principal use, or use for which the product is more commonly used than the other uses? A. The principal use is household laundry. That represents well over 50 percent of the bleach consumed in the household.

Q. Can you tell us just briefly, then, how it is used in the

(Tr. p. 1542)

laundry, and for what purposes? A. Well, it is used in stain removal, for the removal of stubborn stains, and, also, it is used to increase the whiteness or brightness of the clothes that tend to accumulate soil. Garments can be whitened with a combination of bleach and detergent more effectively than with detergent alone, or soap alone.

Q. Is the liquid bleach also used in the kitchen and the bathroom? A. Yes. I previously stated it was used in the kitchen sink. It is used in disinfecting around the kitchen, on the drain board. In the household toilets, the wash bowls, showers.

Q. Does the Purex Corporation manufacture its own bleach or does it convert or cut a stronger solution into household liquid bleach? A. We manufacture our own.

Q. Does your corporation have any product research facilities? A. Yes. We have a product research laboratory that covers about 8,000 square feet, and employs about 40 people.

Q. Does this laboratory work on all your products, including liquid bleach? A. Yes.

Q. Do you know how many liquid bleach producers there are in the sales territory of your liquid bleach? A. About 20 to 25.

Alan C. Stoneman—Direct

(Tr. p. 1543)

Q. The same question with respect to the entire United States? A. From——

Hearing Examiner Haycraft: Is he going to be able to go beyond his own area?

Mr. Tincher: I don't know, sir; we will have to find out.

Hearing Examiner Haycraft: Are you familiar with areas outside of where you sell, yourself?

The Witness: Yes. We sell six products nationally, your Honor, so we have occasion to do market research in the entire United States.

Hearing Examiner Haycraft: For your bleaches?

The Witness: We sell dry bleach nationally.

Mr. Royall: What is the question, please?

(Question read.)

Mr. Royall: I want my objection noted.

Hearing Examiner Haycraft: All right; go ahead.

A. (continuing) From 35 to 50.

By Mr. Tincher:

Q. Is that in addition to those within—— A. No, that is the total.

Q. Which liquid bleach producer, if any, is the principal competitor of the Purex Corporation? A. Clorox.

Q. How many liquid bleach producers have national distribution

(Tr. p. 1544)

and sales of liquid bleaches? A. Just one, Clorox.

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(Tr. p. 1545)

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Q. Mr. Stoneman, are you familiar with the price structure of the liquid bleach industry? A. Yes.

Alan C. Stoneman—Direct

Q. Would you tell us once again, of course briefly as possible, just what that structure is and just how it operates?

A. Well, the prices at which bleach is sold at the retail level tends to fall into three general bands. Purex and Clorox sell in the top bracket, they are the highest priced

(Tr. p. 1546)

products. The regional manufacturers tend to sell at a slightly lower price, but they tend to stay pretty much together in another price band; and the private labeled bleaches sell in another still lower band. So the price structure in the bleaches, there are three bands; there are the high-priced products, there are the independent regional manufacturers, and the private label group.

Q. Would you tell us how the Purex Corporation determines what prices it will charge for its liquid bleaches?

A. Clorox is the leader in the field and sets the price ceiling beyond which Purex cannot sell as a practical matter.

Q. As a result of that situation, what do you do in setting your prices, sir? A. We tend to set our prices to follow Clorox's prices.

Hearing Examiner Haycraft: You mean your maximum?

The Witness: Our maximum, yes, sir. Our present price structure is identical to Clorox's.

Hearing Examiner Haycraft: How long has that been true?

The Witness: About two years.

By Mr. Tincher:

Q. You say it has been true for about two years, sir?

A. Yes.

Q. What difference, if any, was there for a period three or four years preceding that two-year period?

Alan C. Stoneman—Direct

(Tr. p. 1547)

A. I wouldn't want to trust my memory on that, Mr. Tincher. Purex tended to sell below Clorox's prices, never above them.

Q. Can you tell us, Mr. Stoneman, approximately what percentage of your liquid bleach is sold in grocery stores as distinguished from sales in various variety stores, drug-stores or any other type of outlet? A. About 95 percent of our liquid bleach is sold in grocery stores.

Hearing Examiner Haycraft: Do you sell directly to grocery stores?

The Witness: Yes.

By Mr. Tincher:

Q. Do the large grocery chains have their own private labels of bleach? A. Many of them do.

Q. Do you know if any of the large chains manufacture their private labels rather than buy the private labels from any other independent producer? A. I only know of one chain that manufactures, and that is Safeway here on the West Coast.

Q. From 1952 to the present, Mr. Stoneman, has the Purex Corporation ever lost a bleach account to a large chain because of that chain's private label? A. None that I know of.

Q. Does your corporation experience any difficulty in

(Tr. p. 1548)

obtaining shelf space for liquid bleaches? A. Yes. It's difficult to obtain shelf space for any product in the grocery store at the present time.

Q. With reference to that answer, is the problem any different for liquid bleaches than it is for any other grocery store product? A. No, not in my opinion.

Alan C. Stoneman—Direct

Q. Is this difficulty in obtaining shelf space confined to any particular type or category of stores such as chain stores, independent or large chains, or is it just general?

A. No, it's a general problem.

Q. Can you tell us in what section of the grocery store the liquid bleaches are generally found? A. Most grocery stores are divided up into product categories and all of them that I am familiar with have bleaches, soaps, detergents, cleansers, waxes, window cleaners, that whole product category of household cleansers is grouped together in one area of the store.

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(Tr. p. 1549)

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Q. Will you tell us, sir, what the experience of your company has been as to how liquid bleach space, shelf space is allocated by grocery stores?

Mr. Royall: Objection.

Hearing Examiner Haycraft: Overruled.

(Tr. p. 1550)

A. Well, the allocation of shelf space in the grocery stores controlled by the competitive factors that were previously recited; the amount of advertising, the amount of promotion, whether or not the product is being couponed or sampled; what sort of consumer promotion might be offered, how much sales help is offered the store manager in re-allocating or re-arranging shelf space, all these things have a factor in determining which product gets the maximum shelf space.

By Mr. Tincher:

Q. Let me ask you if a liquid bleach producer having

Alan C. Stoneman—Direct

related products such as soaps and detergents and cleansers would be any aid in obtaining shelf space?

* * * * *

A. Yes.

By Mr. Tincher:

Q. Will you explain why, sir?

* * * * *

A. There are a number of reasons. The multi-product manufacturer can maintain stronger sales reports at the retail level. This is an aid in getting shelf space. The multi-product manufacturer normally has lower sales cost, so he has more promotion power; this is an aid in getting shelf space. The more products a manufacturer in our general commodity class sells to the grocery store at a profitable

(Tr. p. 1551)

volume, of course, the more power he has to promote, and all these things are aids in getting shelf space.

* * * * *

Q. Can you tell us, sir, generally speaking, and of course you must be generally speaking, can you tell us generally how many liquid bleaches a grocery store will carry, and by that I mean how many brands? A. Depending on the size of the store and turnover in the market, from two to four. A small retail store might carry a couple of sizes in two brands, whereas a large store might carry three or four—three or even four sizes in four brands.

Q. Is this true also, let me ask you, of the chains such as Safeway, for example, who had their own private label bleaches?

* * * * *

Alan C. Stoneman—Direct

A. Yes.

Hearing Examiner Haycraft: How many sizes are these bleaches sold in?

The Witness: Four in some areas, and three in many others. In the South where you have a lower income group, you sell pints, because they can sell it for 10 or 11 cents a unit. In the North, very few markets except some markets accept pints. The other sizes are quarts, half gallons and gallons.

(Tr. p. 1552)

There has been a fifth size, but it isn't too important; it's a three-quart bottle

By Mr. Tincher:

Q. Would you tell us, sir, how the Purex Corporation goes about attempting to get shelf space for its liquid bleaches?

A. Well, like all other manufacturers, we put our best foot forward and try to persuade the retailer to give us as much shelf space as we think we are entitled to on the basis of the sort of service we give him, kind of product we give him, the merchandising support we give him, and the amount of advertising we can allocate to our product.

(Tr. p. 1558)

Q. Would you tell us which of your products competes with a Procter & Gamble product and in each instance, the name by brand of your product and the name by brand of Procter & Gamble's product or products?

Alan C. Stoneman—Direct

A. Our products liquid and dry Trend compete with Procter &

(Tr. p. 1559)

Gamble's products in the detergent field, Joy, Dreft, Ivory Snow, Ivory Flakes.

Our product, News, competes with Procter & Gamble's heavy duty products, Tide, Cheer, Oxydol.

Our product Old Dutch Cleanser competes with Comet, Procter & Gamble's Comet.

Our product Sweetheart soap competes with Procter & Gamble's toilet soap products, which I believe are Zest, Camay; Zest and Camay.

Those products represent about 85 percent—

Mr. Royall: Objection.

Hearing Examiner Haycraft: Overruled.

Mr. Royall: I move to strike the last part of his answer; it wasn't responsive.

Hearing Examiner Haycraft: Let's see what his answer is.

The Witness: My answer was, Your Honor, those products—in summary, those products represent about 85 percent of Purex's business.

Mr. Royall: Motion to strike.

Hearing Examiner Haycraft: Motion denied. You mean of their soap and detergent business?

The Witness: Of our total business.

Hearing Examiner Haycraft: Total?

The Witness: Yes, sir.

(Tr. p. 1560)

Hearing Examiner Haycraft: That means 15 percent for Purex bleach?

The Witness: No. Purex bleach competes, of course, with Clorox, which is a Procter & Gamble brand.

Alan C. Stoneman—Direct

Hearing Examiner Haycraft: What is the 85 percent?
I don't get it.

The Witness: Well, it's those—

Hearing Examiner Haycraft: What percentage of your total business is composed of Purex?

The Witness: Twenty-seven percent.

Hearing Examiner Haycraft: You are including then, as I understand it, you were including your Purex bleach products with the others?

The Witness: That is correct, sir.

Hearing Examiner Haycraft: I understand.

* * * * *

By Mr. Tinch:

Q. In selling your products, sir, does the Purex Corporation sell to brokers or distributors or do you have a direct sales

(Tr. p. 1561)

force?

A. Presently Purex has a direct sales force, and prior to October of '56 it sold through brokers. It had a combination of direct sales and brokers.

(Tr. p. 1562)

Q. Do you use any brokers today in the sale of your products? A. Yes. We use brokers in some thinly-populated areas. There are the sales territories that head-quarter in Butte, Montana and Denver, Colorado; Phoenix, Arizona; El Paso, Texas; and Lexington, Kentucky.

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(Tr. p. 1563)

Q. You tell us why, sir, if there is any reason, you changed from the brokerage system to the direct-sales system?

* * * * *

Alan C. Stoneman—Direct

A. We changed for two major reasons. One was to reduce our sales cost, and the other was to create a situation under which we had more control over the sales efforts that were applied to the individual retail store and the merchandising effort that was applied to the store.

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(Tr. p. 1564)

* * * * *

Q. Will you tell us, sir, how your liquid bleach is distributed to your customers? A. Our liquid bleach is distributed directly to direct buyers from our manufacturing plants in carloads or truckloads or through warehouses to purchasers that are outlying some distance from our manufacturing plant.

Q. Does the Purex Corporation pay the freight to the customer? A. Yes. We sell all liquid bleach f.o.b. customer's dock.

* * * * *

Q. I believe you mentioned a moment ago, Mr. Stoneman, that you had two reasons for changing from brokers to direct, and one of those you first gave was to reduce the cost to the Purex Corporation. Would you tell us if the change did result in a reduced sales cost?

(Tr. p. 1565)

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A. Yes, it has.

* * * * *

Q. Has the Purex Corporation, either at the present time or in the recent past of a year or so, considered expanding its sales territory for liquid bleach to include the entire nation? A. Yes.

Q. Has such an expansion been made? A. No.

Alan C. Stoneman—Direct

Q. Can you tell us why, if there is a reason?

A. The margin—there is a profit margin in liquid bleaches small, and a capital investment, while it is not great in each plant, a substantial number of plants would be required for Purex to cover the balance of the United States. Because of the narrow margin in—or the small margin of profit, we have elected to use what capital funds we have available in other areas.

(Tr. p. 1567)

Q. Does the Purex Corporation receive in-store promotion on its liquid bleaches in grocery stores? A. Do we receive—

Q. Yes. A. Yes. We seek them, and sometimes we receive them.

(Tr. p. 1569)

Q. Does the Purex Corporation give merchants selling its bleaches any free merchandise prizes?

(Tr. p. 1570)

A. Yes, occasionally.

(Tr. p. 1571)

Q. Thank you, sir. You testified a while ago, sir, about the three levels of prices within the liquid bleach industry—strike that.

Alan C. Stoneman—Direct

Is the wage factor to persons who produce the liquid bleach an important segment of the selling cost of the bleach,

(Tr. p. 1572)

sir? A. Not with Purex Corporation. Our bleach operation is highly mechanized. Direct labor cost is relatively an unimportant factor.

Q. Do you have union labor, sir? A. Yes.

Q. Does the Purex Corporation have any interest in or control over any other liquid bleach producer? A. No.

Q. Can you tell us, Mr. Stoneman, approximately what percentage of your sales costs, of your selling price, rather, is constituted by the factor of freight? A. Yes. It is about 14 percent on liquid bleach.

(Tr. p. 1573)

Q. You already mentioned, sir, about the competition with the Clorox bleach. Will you tell us what strength and significance that competition is as far as your company is concerned?

(Tr. p. 1574)

A. The strength and significance of Clorox competition is substantial. Clorox is the strongest brand in the market, doing roughly 48 percent of the dollars, 37 percent of the units.

Our brand does about 16 percent of the dollars, and 13 percent of the units.

Whenever a brand has this strong a market position, it is, I think, to be concluded that its competition is significant.

Alan C. Stoneman—Direct

(Tr. p. 1575)

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Q. Now, Mr. Stoneman, are you familiar with the liquid bleach situation in Erie, Pennsylvania, and also in Evansville, Indiana, during the latter part of '57 and the first part of 1958? A. Yes.

Q. Are you familiar with the price reduction labels on the Clorox bleach, for example, in Erie, Pennsylvania, three cents off on quarts, five cents on half gallons, and seven cents on gallons? A. Yes.

Q. Now, let me ask you if that situation is limited to a certain geographical area? A. Yes. Our Erie, Pennsylvania, was a test market appearance. We went into the Erie market where we were not distributors or sellers of liquid bleach, to test a new style package, a new label, and a new product. Our test operation was limited to Erie County, and so far as I know the price reduction campaign of three cents, five cents and seven cents off the label on quarts, halves and gallons respectively was also limited to Erie County.

Hearing Examiner Haycraft: You mean Clorox?

The Witness: Yes.

By Mr. Tincher:

Q. Did that price reduction of the Clorox have any effect on

(Tr. p. 1576)

the test that you were attempting to conduct in Erie?

* * * *

A. Yes, it neutralized the test.

* * * *

Q. Let me ask you first, if I may, sir, do you have any

Alan C. Stoneman—Direct

documents along those lines that have been subpoenaed?

A. Yes.

Q. Will those be forthcoming, the documents? A. Yes.

Mr. Tincher: I think, if I may then, sir, I will at this time forego this line of examination.

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(Tr. p. 1577)

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Q. I say, I will ask you the same thing about Evansville as I asked you about Erie, whether or not there are documents involved there which have been subpoenaed?

A. Yes, there are.

Q. Now, does the Purex Corporation have any advertising allowances for its liquid bleach customers? A. Yes, we have a general allowance, as do most of our principal competitors of six cents a case for advertising, merchandising promotion.

Q. Is that allowance that you have for liquid bleach only or for all your products? A. Liquid bleach only. We have other arrangements for cooperative advertising, but the normal cooperative advertising allowance requires some proof of advertising. This allowance is an allowance that does not require proof of performance.

Q. Is there any particular reason for using it other than the other type?

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(Tr. p. 1578)

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The Witness: It is the same allowance. Our allowance is patterned after Clorox's practice in this area. We followed the allowance they granted at the time they installed it.

Alan C. Stoneman—Direct

By Mr. Tincher:

Q. All right, sir. Now, does the Purex Corporation charge the same prices to customers in its entire sales area?

* * * * *

The Witness: Yes, it is substantially true. There may be a difference of a nickel in one or two territories, but I believe you have also asked us for prices, and those will be forthcoming.

* * * * *

Q. Does the Purex Corporation use price-reducing coupons to promote its products, including liquid bleach?

A. Not generally.

Q. Is there any particular reason for not using them, sir?

Mr. Royall: Well, I object, except as applicable to liquid bleach, Your Honor.

Hearing Examiner Haycraft: Yes, your answer must

(Tr. p. 1579)

refer to liquid bleach.

By Mr. Tincher:

Q. All right, sir, you understand the limitation you are under then? A. Yes. Yes.

Now, we do not use price-reducing coupons, mailed coupons.

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Q. All right, sir. Let me ask you, is price reducing coupons an aid in the sale of liquid bleach? A. Yes, very effectively.

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(Tr. p. 1581)

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Alan C. Stoneman—Direct

Q. All right, sir, let me ask you, Mr. Stoneman, did the Purex Corporation use any price reducing coupons in the Erie, Pennsylvania, test market? A. Yes.

(Tr. p. 1582)

Q. Will you tell us why you used those coupons there?
A. We used coupons, price-reducing coupons at Erie in order to get quick distribution and usage by the housewife of a product that we had under test.

Hearing Examiner Haycraft: You mean the shake bottle that you are talking about?

The Witness: Yes.

* * * * *

(Tr. p. 1584)

Q. Will you tell us, sir, what was the method of distributing the coupons at Erie, by that I mean how many; and how was it determined how many should be used?

Mr. Royall: You mean into the Erie area?

Mr. Tincher: Yes.

A. The coupons were mailed, they represented practically a hundred percent distribution to the residents of the area; there were 68,000 coupons mailed.

Hearing Examiner Haycraft: You mean mailed by the consumer?

The Witness: No, mailed by the Purex Corporation.

Hearing Examiner Haycraft: To whom?

The Witness: By our agent to the consumer, to the consumers residing in Erie County.

Hearing Examiner Haycraft: Where did you get the mailing list? How did you secure those, by the telephone directory?

The Witness: No, we got them from Reuben H. Donnelly. There are two companies in the United States that

Alan C. Stoneman—Direct

contract to mail coupons, print them and mail them; Donnelly is one of them.

By Mr. Tincher:

Q. Now, in selling its products, including liquid bleach, does the Purex Corporation use free samples, and by free samples I mean samples that are distributed to the population generally,

(Tr. p. 1585)

rather than to a special or select group? A. No.

(Tr. p. 1586)

Q. All right, sir. Now, in selling your products, including liquid bleach, do you give away premiums, either self-liquidating or free premiums to the housewife?

(Tr. p. 1587)

A. Yes, we have done so. We have given self-liquidating premiums, not free premiums.

By Mr. Tincher:

Q. Is that something that is being done currently, sir?

A. No.

Q. When was that done last? A. About a year and a half ago.

Q. Now, in selling your products, including liquid bleach, has the Purex Corporation given a small size free, or medium size free with a giant size, something of that nature, in selling those products?

A. Not on liquid bleach.

Alan C. Stoneman—Direct

(Tr. p. 1588)

* * * * *

Q. Now, has the Purex Corporation, in selling its products, including liquid bleach, used any contest, and by contest I mean a contest directed at consumers in sales?

A. That is a variation of the question I wanted to check for you, Mr. Tincher.

* * * * *

Q. Does the Purex Corporation use any product combination offers in selling its liquid bleach, and by that I mean combining the liquid bleach with either your other products, or any other producer's products? A. No.

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(Tr. p. 1591)

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Room 229.
Federal Building,
Los Angeles, California.
April 22, 1958.

Met, pursuant to adjournment, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

* * * * *

(Tr. p. 1593)

PROCEEDINGS

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(Tr. p. 1610)

Alan C. Stoneman

a witness for the Commission, having been previously duly sworn, resumed the stand and testified further as follows:

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Alan C. Stoneman—Direct

(Tr. p. 1612)

* * * * *

Q. Mr. Stoneman, I will hand you Commission's Exhibits for identification 438 through 442, inclusive, and I will ask you to tell us what these are and what periods of time they cover, and how they are used. A. These are printed copies of Purex Corporation, Ltd. Annual Reports containing a certified statement of Price, Waterhouse & Company, corporation auditors, the year, the corporation fiscal year is July 1st to June 30th. The reports are marked with the year; the year ending June 30, '57, of course begins July 1st, '57.

* * * * *

Mr. Tincher: All right. Sir, I would like to offer at this time Commission's Exhibits 438 through 442.

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(Tr. p. 1616)

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Hearing Examiner Haycraft: 438 is what I am referring to.

Mr. Tincher: We have extra copies available, 438.

Mr. Royall: Your Honor, what page did you say, sir?

Hearing Examiner Haycraft: 6.

7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22.

* * * * *

Mr. Royall: Your Honor, are you ruling on these, or designating the ones—

Hearing Examiner Haycraft: I am ruling that they are received into evidence, those pages.

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(Tr. p. 1618)

* * * * *

Alan C. Stoneman—Direct

(The document referred to, heretofore marked for identification Commission's Exhibit 438 was received in evidence.)

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(Tr. p. 1620)

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By Mr. Tincher:

Q. Mr. Stoneman, I will hand you Commission Exhibit 443 for identification and ask you if you can tell us what that is and who it was prepared by? A. This is a list of our net sales of liquid bleach, domestic, that is, USA, for our fiscal years ending June 30, 1952 to June 30, 1957 by years.

Q. Who prepared it? A. Showing a total. It was prepared by our accounting department.

Q. Was that under your supervision and direction in answer to this subpoena? A. Yes. The net sales figure that appears here is the same figure that is reported in our annual statement to stockholders.

Mr. Tincher: All right, sir. I offer Commission Exhibit 443.

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(Tr. p. 1622)

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(The document referred to, heretofore marked for identification Commission's Exhibit 443, was received in evidence.)

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(Tr. p. 1623)

Mr. Tincher: Mr. Reporter, will you please mark as Commission Exhibit 444 for identification a one-page document entitled Purex Corporation, Ltd. Advertising and

Alan C. Stoneman—Direct

Promotional Expenses on U.S. Liquid Bleach in the period 1953 to 1957?

* * * * *

Q. Mr. Stoneman, can you tell us who prepared that and at whose direction? A. Yes. This data was prepared by our accounting department at my direction, and it lists for the fiscal year ending June 30, 1953 to June 30, 1957, by years, the expenses for the monies which Purex spent for special promotional allowances on liquid bleach in the United States, the monies spent for agency advertising on liquid bleach in the United States, the monies spent for cooperative merchandising allowances on liquid bleach in the United States, the monies spent for

(Tr. p. 1624)

couponing on liquid bleach in the United States, and the monies spent for other promotions, all by years.

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Mr. Tincher: Mr. Examiner, I offer Commission's Exhibit 444.

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(Tr. p. 1625)

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(The document referred to, heretofore marked for identification Commission's Exhibit 444, was received in evidence, in camera.)

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(Tr. p. 1628)

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Q. Mr. Stoneman, I will hand you Commission Exhibit 447 for identification, and I will ask you to tell us first if it was prepared in answer to the subpoena duces tecum served on you? A. Yes.

Alan C. Stoneman—Direct

(Tr. p. 1629)

Q. Now, will you tell us as briefly as possible who prepared that document and how it was prepared and the sources from which it was prepared without, of course, the—divulging any of the figures or categories thereon?

A. This is a tabulation of the top seven national advertisers in network, T.V., Sunday magazines, spot television, general magazines and the total expenditure, the total expenditures by these companies in advertising, showing the top seven and also Purex Corporation.

The data is taken from publishers information bureau which organization classifies—tabulates and classifies the advertising of all of the leading advertisers in the United States.

Q. Now, let me ask you, sir, if in the normal course and routine of your business, your corporation utilizes or subscribes to the Publishers Information Bureau? A. We do not subscribe to it, but the service is available through us—to us through our advertising agencies.

Q. Do you use it? A. Yes.

Q. For what purpose, sir? A. We use it to keep informed on the advertising activity of competitors and others.

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(Tr. p. 1643)

Mr. Tincer: Mr. Reporter, will you please mark as Commission's Exhibit 450 for identification a one-page chart, a very large piece of paper entitled, "Erie, Pennsylvania Liquid Bleach Audit (New Purex Formula)."

There is a number at the top which I will scratch out. I am not offering it. It has no significance, so far as I am concerned.

This document is a print of some kind, and a typewritten document.

Alan C. Stoneman—Direct

(The paper referred to was marked Commission's Exhibit No. 450 for identification.)

By Mr. Tincher:

Q. Mr. Stoneman, I will hand you Commission's Exhibit 450, and I will ask you to tell us as briefly as you can, and without revealing any figures thereon, what this document is, why it was prepared, and what it reflects, as far as your company is concerned? A. This document represents a compilation of data covering market shares of three principal brands of sodium hypochlorite and others as a separate category, in the Erie, Pennsylvania market, determined from an audit of 25 stores selected at random in that market. The market shares that these brands, the brands specified in these 25 stores. We believe those shares to be representative of the market shares of the brands in the entire area.

(Tr. p. 1644)

Hearing Examiner Haycraft: You mean the Erie, Pennsylvania area?

The Witness: Yes, the Erie, Pennsylvania area.

Hearing Examiner Haycraft: Who made the study; who made the survey?

The Witness: The survey was made, was directed by us.

It was made by M. A. Wallach Research, Inc. I don't have their address, but I can supply it.

(Tr. p. 1645)

By Mr. Tincher:

Q. Let me ask you, sir, if that particular concern was retained or hired by your corporation for the specific purpose of that audit? A. Yes. For the specific purpose of this audit, and others.

Alan C. Stoneman—Direct

The exhibit also shows the advertising and sales promotion activity by calendar periods of four weeks for all brands from the period of March 1st of last year, April 1st of last year to March 3 of this year.

Hearing Examiner Haycraft: From April 3 of last year to March 1st of this year?

The Witness: April 1st of this year.

Hearing Examiner Haycraft: A year?

The Witness: Yes, sir.

Hearing Examiner Haycraft: Where did those figures come from?

The Witness: This year they have been conducted over this period of time, Your Honor.

Hearing Examiner Haycraft: The same people that did your survey 2?

The Witness: Yes, sir. This is all one survey done by M. A. Wallach Research, Inc. These stores were audited, 25 stores in the Erie, Pennsylvania market, were audited each four weeks to determine what the store had purchased, first the inventory of course, and then in each audit what the store

(Tr. p. 1646)

had purchased, and the remaining inventory, and from that a determination was made of what customers had purchased at this retail outlet.

That was done by brands so that—

Hearing Examiner Haycraft: Where were the advertising figures? You said something about advertising.

The Witness: The advertising figures were obtained from local sources, the newspapers, the television station, the radio station.

The competitive activity was obtained from the reports of the researchers who not only inventoried the store and audited the purchases, but who also audited any special

Alan C. Stoneman—Direct

displays, any special deals that were being offered in the stores at the time of the audit.

Hearing Examiner Haycraft: That would include yourself and—

The Witness: That would include us as well.

Hearing Examiner Haycraft: As well as Clorox.

The Witness: As well as Clorox. This audit, this audit covered Purex, Clorox, 101, and all other bleaches in that market in Erie, in the Erie, Pennsylvania market.

By Mr. Tincher:

Q. Now, let me ask you, Mr. Stoneman, this document in the form that it is now in, the way it is, was that prepared for the subpoena duces tecum served upon you specifically, or was

(Tr. p. 1647)

it a document you already had and you were using in your business? A. This data was all in our possession. It was simply compiled in this form for convenient use. We use it in similar form in our operations.

Q. What is the purpose of that, sir? When do you use it?

* * * * *

The Witness: Well, Erie, Pennsylvania, was a test market in which we were testing.

* * * * *

The Witness: Erie, Pennsylvania, was a test market which Purex was testing the saleability under competitive

(Tr. p. 1648)

conditions of a new package and a new product. The package happened to have a new label on it. This test market operation is relatively expensive and, hence, it is carefully audited to determine the results that are achieved

Alan C. Stoneman—Direct

in the test market to measure the effectiveness of the product, the package and the label.

(Tr. p. 1665)

Mr. Tincher: Mr. Reporter, would you please mark Commission's Exhibits 454, for identification, A, B, and C, a three-page form letter stapled, dated October 12, 1957, and entitled, "Bleach Goes Modern," addressed to all sales managers, supervisors, and salesmen.

Hearing Examiner Haycraft: Purex?

Mr. Tincher: Right, sir. And signed on page 3, or space for signature of Alex C. Bruce.

(The document referred to was marked Commission's Exhibits 454-A, B and C for identification.)

(Tr. p. 1668)

Hearing Examiner Haycraft:

Commission's Exhibits 454, A, B and C, Commission's Exhibits 455, A through N, inclusive, are received in evidence.

(Tr. p. 1673)

Q. All right. Now, will you answer the question, just giving us, not dollars, but the percent of sales costwise accounted for by freight, and the same with reference to the percent of sales cost accounted for by glass? A. The percent of sales cost accounted for by freight is 14.33 percent, and the percent of sales cost accounted for by glass is 38.74 percent.

Alan C. Stoneman—Direct

(Tr. p. 1678)

Q. Mr. Stoneman, I will hand you Commission's Exhibit 458 for identification, and ask you if you can tell us what that is, and who prepared it? A. Exhibit 458 is a schedule of Purex national list prices on liquid bleach by sizes covering the entire period, and showing all the changes that occurred in the period of 1/15/56 to 3/9/58. The only exception—

Hearing Examiner Haycraft: Are those published prices, or net prices?

The Witness: These are list prices, published prices. The only exception to these prices, Your Honor, might be a few instances like Erie, Pennsylvania, or Evansville; Indiana, where we sold a small quantity of merchandise at a higher than list price.

Hearing Examiner Haycraft: Commission's Exhibit 458 for identification is received in evidence.

(Tr. p. 1684)

Q. Now, Mr. Stoneman, will you tell us, and as briefly as possible, how your company competes in the detergent field, and in the soap field, and in the cleanser field, with Procter & Gamble, and other manufacturers of those products?

Now, you may want to take those one classification at a time as I have indicated, or, in any other manner that would be appropriate.

A. Your question was how we compete in the detergent field, in the soap field, and in the cleanser field?

Alan C. Stoneman—Direct

By Mr. Tincher:

Q. Yes, sir, with Procter & Gamble, and other manufacturers

(Tr. p. 1685)

in those fields? A. In the detergent field, Purex follows a different policy of selling than Procter & Gamble follows. We sell packages that are pre-marked with a suggested retail price, and both of our detergent products, Trend, liquid and dry, and also New. We attempt to give the customer an attractive buy, and the retailer an attractive margin.

* * * *

A. We take a lower gross profit on the transaction, and we depend upon the attractiveness of the retailer's margin in detergents to gain shelf space, and the attractiveness of the price to move the product off the shelf.

We have a very low advertising or promotion budget in these products.

(Tr. p. 1686)

In some instances we spend no money at all on promotions. In the case of toilet soaps, I am speaking now of bar soaps, our only important brand in the field is Sweetheart. This product is sold largely on a deal basis, on a bargain basis. That has been its history for some 10 or 15 years.

Hearing Examiner Haycraft: What do you mean by deal?

The Witness: By deal I mean a one-cent sale, which is three bars at the regular price with one bar at one cent, or half-price sale, which may be two bars at the regular price with one bar at half price. A very high percentage of Purex's sales in a bar soap, this is well known in the trade, are in the deal category, and Sweetheart also is a

Alan C. Stoneman—Direct

brand that does not support or cannot support high advertising and promotion allowances.

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(Tr. p. 1687)

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By Mr. Tincher:

Q. In conducting your policy of detergents and soaps as you have expressed, what is the relationship between the prices you charge for your detergents and soaps, and the prices the other soap and detergent producers charge for their products, if there is any relationship?

Mr. Royall: Object.

Hearing Examiner Haycraft: If he knows.

By Mr. Tincher:

Q. If you know? A. Well, our list prices are substantially lower than competitive list prices in the case of detergents at all times.

(Tr. p. 1688)

In the case of Sweetheart soap, our list prices are substantially lower by 17 to 25 per cent, during the period when those products are sold on a consumer deal.

* * * * *

(Tr. p. 1689)

* * * * *

Q. Now, sir, can you tell us if you know whether or not this price differential between the Purex detergent and soap products, and the prices of the other competitors in those products, if that differential is carried over in the retail grocery stores in the prices to the consumers?

* * * * *

The Witness: A substantial portion of it is carried over.

Alan C. Stoneman—Direct

I might explain, in the detergent field, the retailer, the retailer normally takes a longer margin on our detergent products than he does on competitive products; hence, even though he buys them at a lower list price, he wouldn't pass the entire difference from the list on to the consumer. He must preserve some of it in order to rebuild his retail margin.

By Mr. Tincher:

Q. Will you tell us the business reasons of the Purex Corporation, Ltd. for adopting this sales policy in the detergent and in the soap fields?

* * * * *

(Tr. p. 1690)

The Witness: In the detergent field the fundamental reason for adopting the policy is that this is a method for competing with major producers. It is the only method we know of which, under which we can successfully compete with the major producer; the long retail margin insures shelf space, the low price to the consumer insures movement. He must have both those things to stay in business.

* * * * *

By Mr. Tincher:

Q. All right, sir. Now, let me ask you if as a detergent and a soap producer, if you are familiar with the promotional techniques and advertising techniques used in the soap and detergent business, and by that I have reference to such things as free samples to consumers, contests to consumers, coupons, product combination offers, all that sort of thing? A. Yes.

* * * * *

Q. Let me ask you if in your experience as a liquid

Alan C. Stoneman—Direct

bleach producers that sort of activity has been carried on in the liquid bleach business?

* * * * *

(Tr. p. 1691)

* * * * *

The Witness: The bleach business is somewhat different than the soap and synthetic detergent business with respect to promotion techniques used. Free samples or coupons are

(Tr. p. 1692)

rarely used in the bleach business. I have no knowledge of any broad use of free samples or coupons in the bleach business.

By Mr. Tincher:

Q. And, from the viewpoint—— A. For the last five years.

Q. From the viewpoint of Purex Corporation, sir, is there any reason for that? A. From our viewpoint, our budget for promotion would not stand the expenses that are coincident with couponing and sampling. I know of no——

Mr. Royall: What question is he now answering?

Hearing Examiner Haycraft: He is still answering that question, but he is taking these respective promotional schemes.

Go ahead.

The Witness: Contests are used in the bleach business, and premiums. We have used them ourselves, but these are relatively inexpensive promotion devices. You may be able to run a national contest at the cost of \$25,000 to \$50,000, as an illustration. Premiums usually are self-liquidating. So they do not represent high promotional costs.

Alan C. Stoneman—Direct

The advertising cost in the bleach business has been generally lower than in the soap and detergent business with respect to the percent of net sales that are spent in advertising.

(Tr. p. 1693)

* * * * *

Promotion devices normally used in the bleach business are promotion devices at the retail level, localized display allowances. I think that answers it.

By Mr. Tinch:

Q. Is that as contrasted to offers to the consumer public over wide geographical areas? A. No, offers to the consumer in terms of cents off the label over a wide geographical area are not used, they are too expensive to be used. The economics of the bleach business wouldn't allow most manufacturers to use them, or any manufacturer to use them generally.

* * * * *

(Tr. p. 1695)

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Q. Mr. Stoneman, you just testified for us about the different types of promotions used in the detergent, soap, and liquid bleach industries, and you have testified that some promotions are used in all three of those branches.

Now, my question is, from your experience in those three industries, can you tell us if there is any difference between the frequency of use of those promotions in the soap and detergent industries compared to the liquid bleach industry? A. Yes.

* * * * *

(Tr. p. 1696)

* * * * *

Alan C. Stoneman—Direct

The Witness: Yes, there is a higher frequency of use of promotion devices in package soaps, detergents, and toilet soaps than there is in the bleach industry.

* * * * *

By Mr. Tincher:

Q. Now, Mr. Stoneman, I would like to ask you a question of how you compete with Procter & Gamble, and other producers of powdered cleansers in the scouring cleanser industry?

* * * * *

The Witness: The scouring cleanser business is somewhat different than the detergent business, or the soap business, in that the unit of sale at the retail level is relatively small, on the order of 12, 13, 14 cents a unit. This type of a consumer item does not lend itself to an attractive consumer deal because the difference between any deal that you can offer the consumer, or any purchase that you can offer the consumer and the price at which he can buy a unit at regular price is relatively small, hence a consumer promotion on price only, unless it is a deep cut, which can't be sustained over a long period of time, is impractical. So, we cannot use the same techniques in competing that we use in

(Tr. p. 1697)

the detergent business in the cleanser business. We must compete in the cleanser business on a regular basis. We must compete, using the same methods that our competitors use, namely, attempt to match them with advertising with promotions, and with all the other devices that are used to promote the sale of a product.

(Tr. p. 1698)

* * * * *

Alan C. Stoneman—Direct

By Mr. Tincher:

Q. On that particular point that you were just talking about, is there any relationship between the powdered cleanser industry and the liquid bleach industry?

* * * * *

A. I don't understand what you mean by "relationship" as you are using it in this term.

Hearing Examiner Haycraft: I think what he means, whether it is more like bleach than it is like a detergent.

The Witness: Well, the two fields are fairly closely allied; they are in the same general competitive area.

* * * * *

By Mr. Tincher:

(Tr. p. 1699)

Q. Well, I had reference to your previous answer where you testified how you competed in the powdered cleanser industry, what you had to do to compete in that industry. My question was, if there is a relationship between what you have to do in that industry and what you do in the liquid bleach industry? A. No.

* * * * *

A. (continuing) The competitive pressures in the cleanser industry are much higher; they are a much higher level than they are in the bleach industry, and more funds must be allocated to promotion, more promotion devices have to be used, and more advertising must be expended in relationship to the dollar of sale.

* * * * *

By Mr. Tincher:

Q. When did your company enter the powdered cleanser industry?

Alan C. Stoneman—Direct

(Tr. p. 1700)

A. In May of 1953, Purex Corporation entered the cleanser industry by purchasing Old Dutch Cleanser, which was a spin-off from the Cudahy Packing Company.

Q. Do you know how long Old Dutch Cleanser had been selling in the retail markets of America?

A. About fifty years.

Q. Do you know the market share that Old Dutch Cleanser enjoyed at the time it was acquired by your company?

A. Yes.

(Tr. p. 1701)

Q. What was that, sir?

A. About 4½ percent.

Q. Now, subsequent to that period of time, did the Purex Corporation make any effort to increase the sale or distribution, or both, of Old Dutch Cleanser?

A. Yes.

Q. Were you successful in that effort?

A. Yes, we increased the market share of Old Dutch

Alan C. Stoneman—Direct

Cleanser over a period of about a little more than a year from 4½ percent to 12, 13 percent.

* * * * *

(Tr. p. 1702)

Q. How did you do that, sir?

* * * * *

A. We did that through advertising, and through consumer deals, and other promotion devices.

* * * * *

Q. Now, you say that occurred within a year?

* * * * *

A. No, it is a longer period, longer period than that. It is from May of '55 to the fall of—it was about 18 months.

* * * * *

Q. Now, does the product, Old Dutch Cleanser, still occupy that share of the market? A. No, it doesn't.

* * * * *

(Tr. p. 1703)

* * * * *

Q. What share of the market does it occupy at the present time, sir?

* * * * *

A. About 6 percent.

* * * * *

Q. Can you tell us the reasons you attribute to that decrease in market share?

* * * * *

A. The reduction in market share of Old Dutch is due principally to the entry of a new product in the field, and the high level of promotion on advertising that has been directed at the whole cleanser field.

* * * * *

Alan C. Stoneman—Direct

Q. What is that new product, sir?

* * * *

A. The new product is Comet.

(Tr. p. 1704)

* * * *

Q. Do you know the market share and the market range at the present time of the product, Comet?

* * * *

A. The basis of our last MRCA report, it is in first position, with 36 percent plus, on the market.

* * * *

(Tr. p. 1729)

* * * *

By Mr. Tinch: /

Q. Do you have knowledge of whether or not the product Comet was the first powdered cleanser to have a bleaching agent in it?

* * * *

A. Yes.

* * * *

(Tr. p. 1730)

* * * *

Q. What is your knowledge, sir?

* * * *

A. To the best of my knowledge, Dutch Cleanser was the first product that had a bleach in it.

* * * *

Q. Now, Mr. Stoneman, since the introduction of Comet, have you as an official of your company studied the promotion and

(Tr. p. 1731)

advertising which has been utilized in selling that product?

* * * *

Alan C. Stoneman—Direct

A. Yes.

Q. And has your company, the Purex Company, been able to compete with the product as it has been promoted and advertised?

A. No.

Q. Will you tell us, please, the factors involved which have made it so that you cannot compete?

A. The promotion weight put behind Comet of free sample, coupons, advertising, and consumer deals, was so heavy that our own budget was relatively ineffective by comparison.

The promotion costs of all the Comet promotions combined was in the order of \$7 million per year. Our own budget in this area was about \$1 million, and there is no effective

(Tr. p. 1732)

method of competing against this type of a combination, advertising, sampling, couponing, promotioning, operationing, unless you match it, the one who is promoting, with dollars, in the same areas; and we were unable to do that, and hence, we were unable to compete.

Q. Now, is there any marketing reason, or is there any reason of any nature why such a program of promotion and advertising as was utilized with Comet would not be used with the product Clorox?

A. None.

Nathan Smooke—Direct

(Tr. p. 1747)

Room 229,
Federal Building,
Los Angeles, California.

April 23, 1958.

Met, pursuant to adjournment, at 10:00 a.m.

BEFORE:

EVERETT F. HAYCRAFT, Hearing Examiner.

(Tr. p. 1749)

PROCEEDINGS

(Tr. p. 1754)

Nathan Smooke

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Haycraft: Will you state your full name?

The Witness: Nathan Smooke.

DIRECT EXAMINATION

By Mr. Tincher:

Q. Mr. Smooke, what is your occupation, sir? A. President of Lady's Choice Foods.

Q. What business is Lady's Choice Foods engaged in, sir? A. Manufacturer and distributor of sundry food products, bleaches, et cetera.

Q. Would you explain to us briefly what the "et cetera" is? A. Bluing, ammonia, and a small volume of sundry items.

Nathan Smooke—Direct

Q. How long have you been with the Lady's Choice Foods? A. Since 1925.

Q. How long has Lady's Choice Foods existed as a producer

(Tr. p. 1755)

of these various products? A. Since 1925.

Q. What are your duties as president of Lady's Choice Foods, sir? A. Well, to look after the overall welfare of the company.

Q. Had you finished, sir? Don't let me interrupt you. A. Yes.

Q. Is Lady's Choice Foods a corporation? A. Yes, it is.

Q. Is it a public corporation or a family type? A. It is a closely-held corporation of just a small number of stockholders.

Q. How long has your company produced a liquid bleach product, sir? A. Since 1925.

Q. What brand name is your bleach sold under? A. Our main seller is Sanicolor. Then we have the other brand name, which is Hypo. Then we have various labels that we pack for private concerns.

Q. Now, is the liquid bleach that you produce all household? By that, I mean bleaches sold in grocery stores for housewives. A. Yes. We have another bleach which is called Purewhite, that is 16 percent, that is sold to industrial concerns; swimming pool companies.

(Tr. p. 1756)

Q. All right, sir. What solution is your Saniclor and household bleaches? A. 5¼.

Q. Is it a sodium hypochlorite type of bleach? A. Yes.

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